United States Court of Appeals

for the Second Circuit

APPENDIX

74-1447

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 74-1447

RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT, and YANICK PETIT, on Behalf of Themselves, and all Aliens in the United States similarly situated,

Appellants-Plaintiffs

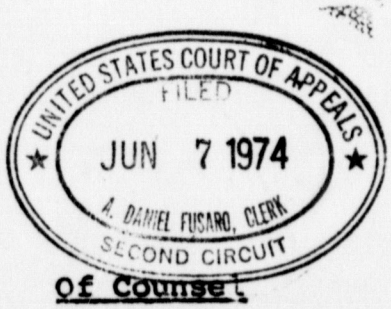
v.

LEONARD H. CHAPMAN, as Commissioner of the Immigration & Naturalization Service, and SOL MARKS, as New York District Director of the United States Immigration & Naturalization Service,

Appellees-Defendants.

Appeal from the United States District Court
For the Southern District of New York

APPELLANT'S APPENDIX



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CIVIL DOCKET — CLASS ACTION

UNITED STATES DISTRICT COURT

Jury demand date: 2/27/74

JUDGE GRIESA

73 CIV. 3632

Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
ROOSEVELT NOEL EMILIS NOEL EDDY ANTOINE PETIT and YANICK PETIT on behalf of themselves and all aliens in U.S.Similarly situated Vs. JAMES F.GREEN,Commissioner of Immigration & Naturalization Service, SOL MARKS,NY District Director of U.S.Immigration & Naturalization Service	For plaintiff: Fried Frankman&Del Rey,P.C. 515 Madison Ave,NYC10022 688-8525 For defendant:

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
S. 5 mailed X	Clerk		2/27/74			
S. 6 mailed	Marshal					
Basis of Action: Immigration action regarding deportation.	Docket fee					
	Witness fees					
Action arose at:	Depositions					

73 Civ.3682

RODOLPHE NOEL ET AL VS. JAMES F. GREEN, ETC ET ANO 73 Civ. 3682

73 CIV. 368

DATE	PROCEEDINGS	Date Judgm
Aug 24-73	Filedcomplaint and issued summons.	
Aug.27-73	Filed Pltff's Order to Show Cause to stay deportation with a stay ret.9/10/73, Rm 110,10:00 A.M.	
Aug.27-73	Filed Memorandum in support of Pltffs'Motion for preliminary injunction.	
Sep.17-73	Filed affidavit of S.H. Wallenstein in opposition to motion for a, preliminary injunction.	
Sep.17-73	Filed deft's memorandum of law in opposition to motion for a preliminary injunction.	
Sep 18-73	Filed Stip & Order adjourning hearing on motion for preliminary injunction to 9/18/73 1:30 P.M. MACMAHON,J.	
Sep13-73	Filed summmons & ent. marshal's return,served: J. Green by Mrs. Troia on 8-29-73, Sol Marks by Mrs. Weinbach on 8-29-73 & U.S. Atty S.D.N.Y. by Mrs. Troia on 8-29-73.	
Feb 8-74	Filed Opinion #40347...Upon review of pltffs' arguments, the probability of ultimate success on the merits is not sufficiently likely to warrant the preliminary relief requested. Accordingly, the motion for a preliminary injunction isdenied. Gagliardi,J. mn	
Feb27/74	Filed pltffs' notice of appeal from order of 2/8/74. Mailed copies to: U.S. Atty	
Feb. 28-74	Filed plaintiff's amended notice of appeal from order dtd: 2-8-74. Mailed copies	
Apr. 5-74	Filed plaintiffs' memo. of law in reply to defts' opposition to plaintiffs' motion for a preliminary injunction.	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT, and YANICK PETIT, on Behalf of Themselves, and all Aliens in the United States Similarly Situated,

Plaintiffs,

v.

JAMES F. GREEN, as Commissioner of the Immigration & Naturalization Service, and SOL MARKS, as New York District Director of the United States Immigration & Naturalization Service,

Defendants.

COMPLAINT

Plaintiffs, for themselves, and on behalf of all aliens in the United States similarly situated, complaining of the Defendants, by Fried, Pragoman & Del Rey, their attorneys, allege:

AS A FIRST CAUSE OF ACTION ON BEHALF OF PLAINTIFFS EDDY ANTOINE PETIT AND YANICK PETIT AND ALL ALIENS IN THE UNITED STATES SIMILARLY SITUATED

1. Plaintiff Eddy Antoine Petit is a native and citizen of Haiti and will imminently be ordered to surrender for deportation within the Southern District of New York.

2. Plaintiff Yanick Petit is the lawful spouse of plaintiff Eddy Antoine Petit, and is a lawful permanent resident of the United States having lawfully been admitted to the United States for permanent residence on June 19, 1973. The said plaintiffs were married in the City and State of New York on

June 26, 1973, and reside together as husband and wife.

3. Defendants James F. Green and Sol Marks are Commissioner of the United States Immigration and Naturalization Service, and District Director of the New York District of the United States Immigration and Naturalization Service, respectively, with offices within the Southern District of New York.

4. Plaintiff Eddy Antoine Petit has formally established entitlement to an immigrant visa based upon his marriage to plaintiff Yanick Petit, and, on information and belief, will soon be issued a priority date under the Western Hemisphere numerical limitation by the American Consulate at Montreal, Canada.

5. In order to become a lawful permanent resident of the United States, plaintiff Eddy Antoine Petit need only await the availability of an immigrant visa subject to the Western Hemisphere numerical limitation.

6. On June 8, 1973, an order finding plaintiff Eddy Antoine Petit to be a deportable alien was entered by a Special Inquiry Officer of the Immigration and Naturalization Service, and said plaintiff was granted voluntary departure on or before July 8, 1973, or any extension beyond such date as granted by the District Director of the Immigration and Naturalization Service.

7. On July 17, 1973, plaintiff Eddy Antoine Petit, by his attorney, requested an extension of time from defendants in which to depart the United States. Such request was founded upon the fact that plaintiff Eddy Antoine Petit is married to a lawful permanent resident of the United States, Yanick Petit, with whom he resides in the United States. Such request was one

falling within the official discretion of defendants, and defendants were obliged to exercise such discretion in a reasonable and non-arbitrary manner.

8. On July 18, 1973, defendant Sol Marks, as New York District Director of the Immigration and Naturalization Service, denied plaintiff Eddy Antoine Petit's request for an extension of time in which to depart, and thereby prevented said plaintiff from lawfully remaining in the United States while his visa application is pending. Defendant's failure to exercise their discretion in favor of plaintiffs Eddy Antoine Petit and Yanick Petit was not part of a final order of deportation, and is not initially reviewable in the Court of Appeals.

9. The refusal of defendants to exercise their discretion in favor of permitting plaintiff Eddy Antoine Petit to remain in the United States with his spouse while awaiting the availability of an immigrant visa, was based entirely upon an arbitrary, unreasonable, and capricious policy first placed into effect by the defendants on August 1, 1972, and subsequently modified. Such policy routinely allows aliens who are natives of the Western Hemisphere to remain in the United States to await visa issuance after a nonimmigrant admission, based upon their being spouses or unmarried sons or daughters of a citizen of the United States, but denies the same rights to aliens who have identical relationships with a lawful permanent resident of the United States. Such policy unlawfully creates two classes of aliens awaiting visas -- those with close relatives who are citizens of the United States, and those with close relatives who are lawful permanent residents of the United States, and requires that those deportable aliens falling within the latter class demonstrate the existence of extraordinary circumstances before defendants will permit them to remain within the

United States while awaiting visa availability.

10. The aforementioned policy has a further refinement of an equally discriminatory nature in its application to close relatives of permanent residents of the United States who are awaiting visa availability. Aliens who are natives of the Western Hemisphere are permitted to remain in the United States during visa processing, where the alien married a lawful permanent resident before April 10, 1973, and was present in the United States before April 10, 1973. Western Hemisphere natives who are spouses or unmarried sons or daughters of permanent residents are not considered eligible for discretionary deferred departure relief unless both the relationship and the presence of the affected alien in the United States were in effect on April 10, 1973.

11. There is no rational basis for the above-mentioned policy which is routinely implemented by defendants and which is arbitrary, capricious, unreasonable, and an abuse of discretion, and by which no legitimate interest of the United States is served.

12. On information and belief, prior to the aforementioned change in policy implemented on August 1, 1972, deportable aliens who were natives of Western Hemisphere nations, who were in the United States awaiting the availability of immigrant visas, were uniformly g[illegible]ed stays of deportation by defendants, where such aliens had cl[illegible] relatives living in the United States who were either citizens thereof, or lawful permanent resident aliens.

13. On information and belief, under the policy in effect prior to August 1, 1972, plaintiff Eddy Antoine Petit would have been permitted to remain in the United States pending

visa eligibility based entirely upon his marriage to plaintiff Yanick, a lawful permanent resident of the United States.

14. On information and belief, the aforementioned policy of defendants which was implemented by Operating Instructions issued on August 1, 1972, resulted solely and entirely from a directive issued to Raymond M. Farrell, then Commissioner of the Immigration and Naturalization Service, on or about June 27, 1972, by Representative Peter W. Rodino, Jr., of the United States House of Representatives, serving as Chairman of Subcommittee Number 1 (the Immigration and Nationality Subcommittee) of the Committee on the Judiciary. On information and belief such memorandum and contemporaneous oral communications indicated that Western Hemisphere aliens with permanent resident spouses, or close relatives, be henceforth forbidden to remain in the United States pending visa availability. On information and belief, said instruction was implemented until March 28, 1973, when further directives were issued by Representative Peter W. Rodino, Jr., then Chairman of the Judiciary Committee, to the Commissioner of the Immigration and Naturalization Service, indicating that said policy was to no longer be implemented, and that aliens who were natives of the Western Hemisphere and close relatives of permanent residents should be approved to remain in the United States pending visa processing abroad. On information and belief, the Immigration and Naturalization Service after orally receiving the approval of Representative Peter W. Rodino, Jr. subsequently issued an Operating Instruction which indicated that both close relatives of citizens and close relatives of permanent residents awaiting visa availability would be routinely granted discretionary deferred departure relief, but that such deferred departure relief would not be granted to close relatives

of permanent residents if either their relationship to the permanent resident or their presence in the United States occurred subsequent to the date of April 10, 1973.

15. The implementation of the above-mentioned directive by defendants constitutes an abuse of discretion by defendants and is arbitrary, capricious, unreasonable and, an unlawful abdication by defendants of the powers and authority conferred upon the Attorney General and his delegates by the Immigration and Nationality Act.

16. Jurisdiction of this Court is claimed by virtue of 5 U.S.C. Section 702, Section 704, and Section 706(2)(A); 8 U.S.C. Section 1329; 28 U.S.C. Section 2201; 28 U.S.C. Section 1346; and 28 U.S.C. Section 1651. Venue in this district is claimed by virtue of 28 U.S.C. Section 1391(e).

WHEREFORE, plaintiffs demand judgment against defendants as follows:

(A) Declaring that any policy of defendants which discriminates between deportable aliens with United States citizen immediate relatives, and those with permanent resident immediate relatives in granting stays of deportation is unlawful, or discriminated between aliens with permanent resident alien relatives on the basis of the April 10, 1973 date, or any other arbitrary date on which they entered the United States, or became a close relative of a permanent resident is unlawful.

(B) Enjoining defendants from discriminating between deportable aliens with United States citizen immediate relatives, and deportable aliens with permanent resident immediate relatives in the granting of stays of deportation, or discriminating

between aliens with permanent resident relatives on the basis of the April 10, 1973 date, or any other arbitrary date, which they entered the United States or became a close relative of a permanent resident.

(C) Enjoining defendants from deporting plaintiff Eddy Antoine Petit until his request for a stay of deportation has been adjudicated under the same policies and standards which apply to similar requests from deportable aliens with United States citizen immediate relatives, or aliens with permanent resident relatives who were in the United States, and had entered into the relationship prior to April 10, 1973.

(D) Granting such other and further relief as may seem just and proper.

A SECOND CAUSE OF ACTION ON BEHALF OF PLAINTIFFS RODOLPHE NOEL, AND EMERIS NOEL, AND ALL ALIENS IN THE UNITED STATES SIMILARLY SITUATED.

17. Plaintiff Rodolphe Noel is a native and citizen of Haiti, and will imminently be ordered by defendants to surrender for deportation in the Southern District of New York.

18. Plaintiff Emeris Noel is the lawful spouse of plaintiff Rodolphe Noel, and is a lawful permanent resident of the United States, having been lawfully admitted to the United States for permanent residence on April 22, 1968. The said plaintiffs were married in the City and State of New York on April 19, 1973, and reside together as husband and wife.

19. Defendants James F. Green, and Sol Marks are Commissioner of the United States Immigration and Naturalization Service, and New York District Director of the Immigration and Naturalization Service, respectively, with offices within the

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Southern District of New York.

20. Plaintiff Rodolphe Noel has formally established entitlement to an immigrant visa based upon his marriage to plaintiff Emeris Noel, and, on information and belief, will soon be issued a priority date under the Western Hemisphere numerical limitation by the American Consulate at Montreal, Canada.

21. In order to become a lawful permanent resident of the United States, plaintiff Rodolphe Noel need only await the availability of an immigrant visa subject to the Western Hemisphere numerical limitation.

22. On June 27, 1973, an order finding plaintiff Rodolphe Noel to be a deportable alien was entered by a Special Inquiry Officer of the Immigration and Naturalization Service, and said plaintiff was granted the privilege of voluntary departure.

23. Plaintiff Rodolphe Noel's request for an extension of time to remain in the United States, was one falling within the official discretion of defendants, and defendants are obliged to exercise such discretion in a reasonable and non-arbitrary manner.

24. On August 20, 1973, defendant Sol Marks, as New York District Director of the Immigration and Naturalization Service granted a brief extension of time to depart from August 21, 1972 to August 28, 1973, solely to provide sufficient time for this suit to be filed and for no other reason. Plaintiff Rodolphe Noel was not granted permission to remain in the United States during the pendency of his visa application.

25. The refusal of defendants to exercise their discretion in favor of permitting plaintiff, Rodolphe Noel to

remain in the United States with his spouse while awaiting the availability of an immigrant visa was based entirely upon an arbitrary, unreasonable, and capricious policy first placed into effect by the defendants on August 1, 1972, and subsequently modified. Such policy routinely allows aliens who are natives of the Western Hemisphere to remain in the United States to await visa issuance after a nonimmigrant admission, based upon their being spouses or unmarried sons or daughters of a citizen of the United States, but denies the same rights to aliens who have identical relationships with a lawful permanent resident of the United States. Such policy unlawfully creates two classes of aliens awaiting visas -- those with close relatives who are citizens of the United States, and those with close relatives who are lawful permanent residents of the United States, and requires that those deportable aliens falling within the latter class demonstrate the existence of extraordinary circumstances before defendants will permit them to remain within the United States while awaiting visa availability.

26. The aforementioned policy has a further refinement of an equally discriminatory nature in its application to close relatives of permanent residents of the United States who are awaiting visa availability. Aliens who are natives of the Western Hemisphere are permitted to remain in the United States during visa processing where the alien married a lawful permanent resident before April 10, 1973, and was present in the United States before April 10, 1973. Western Hemisphere natives who were spouses or unmarried sons or daughters of permanent residents are not considered eligible for discretionary deferred departure relief unless both the relationship and the presence of the affected alien in the United States were in effect on April 10,1973.

27. There is no rational basis for the above-mentioned policy which is routinely implemented by defendants and which is arbitrary, capricious, unreasonable, and an abuse of discretion, and by which no legitimate interest of the United States is served.

28. On information and belief, prior to the aforementioned change in policy implemented on August 1, 1972, deportable aliens who were natives of Western Hemisphere nations who were in the United States awaiting the availability of immigrant visas were granted stays of deportation by defendants, where such aliens had close relatives living in the United States who were either citizens thereof, or lawful permanent resident aliens.

29. On information and belief, under the policy in effect prior to August 1, 1972, plaintiff, Rodolphe Noel, would have been permitted to remain in the United States pending visa eligibility based entirely upon his marriage to plaintiff Yanick Noel, a lawful permanent resident of the United States.

30. On information and belief, the aforementioned policy of defendants which was implemented by Operating Instructions issued on August 1, 1972, resulted solely and entirely from a directive issued to defendant Raymond M. Farrell, then Commissioner of the Immigration and Naturalization Service, on or about June 27, 1972, by Representative Peter W. Rodino, Jr. of the United States House of Representatives, serving as Chairman of Subcommittee Number 1 (the Immigration and Nationality Subcommittee) of the Committee on the Judiciary. On information and belief, such memorandum and contemporaneous oral communications indicated that Western Hemisphere aliens with permanent resident spouses, or close relatives, be henceforth forbidden to remain

in the United States pending visa availability. On information and belief, said instruction was implemented until March 28, 1973, when further directives were issued by Representative Peter W. Rodino, Jr., then Chairman of the Judiciary Committee, to the Commissioner of the Immigration and Naturalization Service, indicating that said policy was to no longer be implemented and that aliens who were natives of the Western Hemisphere and close relatives ofpermanent residents should be allowed to remain in the United States pending visa processing abroad. On information and belief, the Immigration and Naturalization Service, after orally receiving the approval of Representative Peter W. Rodino, Jr., subsequently issued an Operating Instruction which indicated that both close relatives of citizens and close relatives of permanent residents awaiting visa availability would be routinely granted discretionary deferred departure relief, but that such deferred departure relief would not be granted to close relatives of permanent residents if either their relationship to the permanent resident or their presence in the United States occurred subsequent to the date of April 10, 1973.

31. The implementation of the above-mentioned directive by defendants constitutes an abuse of discretion by defendants and is arbitrary, capricious, unreasonable and, an unlawful abdication by defendants of the powers and authority conferred upon the Attorney General and his delegates by the Immigration and Nationality Act.

32. Jurisdiction of this Court is claimed by virtue of 5 U.S.C. Section 702, Section 704, and Section 706(2)(a); 8 U.S.C. Section 1329; 28 U.S.C. Section 2201; 28 U.S.C. Section 1346; and 28 U.S.C. Section 1651. Venue in this district is

claimed by virtue of 28 U.S.C. Section 1391(e).

WHEREFORE, plaintiffs demand judgment against defendants as follows:

(A) Declaring that any policy of defendants which discriminates between deportable aliens with United States citizen immediate relatives, and those with permanent resident immediate relatives in granting stays of deportation is unlawful or discriminated between aliens with permanent resident alien relatives on the basis of the April 10, 1973 date, or any other arbitrary date which they entered the United States or became a close relative of a permanent resident is unlawful.

(B) Enjoining defendants from discriminating between deportable aliens with United States citizen immediate relatives, and deportable aliens with permanent resident immediate relatives in the granting of stays of deportation, or discriminating between aliens with permanent resident relatives on the basis of the April 10, 1973 date or any other arbitrary date in which the latter entered the United States or became a close relative of a permanent resident.

(C) Enjoining defendants from deporting plaintiff Rodolphe Neel until his request for a stay of deportation has been adjudicated under the same policies and standards which apply to similar requests from deportable aliens with United States citizen immediate relatives, or aliens with permanent resident relatives who were in the United States and has entered into the relationship prior to April 10, 1973.

(D) Granting such other and further relief as may seem just and proper.

AS A THIRD CAUSE OF ACTION ON BEHALF OF RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT, AND YANICK PETIT, AND ALL ALIENS IN THE UNITED STATES SIMILARLY SITUATED

33. Plaintiffs hereby reassert and incorporate the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32.

34. In exercising the discretion which is conferred upon them by law, defendants are obliged to adhere to the Fifth Amendment to the United States Constitution which guarantees that no person shall be denied the equal protection of the laws, and that no invidious distinctions shall be made between individuals or between classes of individuals.

35. The aforesaid policy of defendants which discriminates between lawful permanent residents of the United States, and citizens of the United States, in staying or failing to stay the deportation of their immediate relatives awaiting visa availability is violative of the guarantee of equal protection of the laws implied in the Fifth Amendment to the Constitution of the United States, and thus, an abridgment of the rights of both the alien and the lawful permanent resident alien spouse.

36. Jurisdiction of this Court is claimed by virtue of 5 U.S.C. Section 702, Section 704, and SEction 706(2)(a); 8 U.S.C. Section 1329; 28 U.S.C. Section 2201; 28 U.S.C. Section 1346; and 28 U.S.C. Section 1651. Venue in this District is claimed by virtue of 28 U.S.C. Section 1391(e).

WHEREFORE, plaintiffs demand judgment against defendants as follows:

(A) Declaring that the policy of defendants which discriminates between deportable aliens with United States citizen immediate relatives, and those with permanent resident immediate relatives is unlawful.

(B) Enjoining defendants from discriminating between deportable aliens with United States citizen immediate relatives, and deportable aliens with permanent resident immediate relatives in the granting of stays of deportation.

(C) Enjoining defendants from deporting the deportable alien plaintiffs and all aliens in the United States similarly situated until their requests for stay of deportation have been adjudicated under the same policies and standards which apply to similar requests from deportable aliens with United States citizen immediate relatives.

(D) Granting such other and further relief as may seem just and proper.

AS A FOURTH CAUSE OF ACTION ON BEHALF OF ROOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT, AND YANICK PETIT, AND ALL ALIENS IN THE UNITED STATES SIMILARLY SITUATED

37. Plaintiffs hereby reassert and incorporate the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36.

38. In exercising the discretion which is conferred upon them by law, defendants are obliged to adhere to the Fifth Amendment to the United States Constitution which guarantees that no person shall be denied the equal protection of the laws.

and that no invidious distinctions shall be made between individuals or between classes of individuals.

39. The aforesaid policy of defendants which discriminates between deportable aliens who are natives of the Western Hemisphere and are close relatives of lawful permanent residents of the United States in staying or failing to stay the deportation while awaiting visa availability, on the basis of whether the alien was in the United States before April 10, 1973 and whether the relationship was in existence before April 10, 1973, is violative of the guarantee of equal protection of the laws implied in the Fifth Amendment to the Constitution of the United States, and thus an abridgement of the rights of both the alien and the lawful permanent resident alien spouse.

40. Jurisdiction of this Court is claimed by virtue of 5 U.S.C. Section 702, Section 704, and Section 706(2)(a); 8 U.S.C. Section 1329; 28 U.S.C. Section 2201; 28 U.S.C. Section 1346; and 28 U.S.C. Section 1651. Venue in this District is claimed by virtue of 28 U.S.C. Section 1391(e).

WHEREFORE, plaintiffs demand judgment against defendants as follows:

(A) Declaring that the policy of defendants which discriminates between deportable aliens with permanent resident immediate relatives on the basis of whether the deportable alien was in the United States and the relationship existing before April 10, 1973, is unlawful.

(B) Enjoining defendants from discriminating between deportable aliens with permanent resident immediate relatives in the granting of stays of deportation, dependent

upon whether the deportable alien was in the United States and the relationship existing prior to April 10, 1973.

(C) Enjoining defendants from deporting the deportable alien plaintiffs and all aliens in the United States similarly situated until their requests for stay of deportation have been adjudicated under the same policies and standards which apply to similar requests from deportable aliens who were in the United States with the relationship existing before April 10, 1973.

(D) Granting such other and further relief as may seem just and proper.

AS A FIFTH CAUSE OF ACTION ON BEHALF OF RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT, AND YANICK PETIT, AND ALL ALIENS IN THE UNITED STATES SIMILARLY SITUATED

41. Plaintiffs hereby reassert and incorporate the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36.

42. In formulating statements herein, and policies of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy, defendants are required under the Administrative Procedure Act, 5 U.S.C. 551 et seq. to publish a notice of proposed Rule Making in the Federal Register, and to afford interested persons an opportunity to participate in the rule making through the submission of written data, views, or arguments; and pursuant to said Administrative Procedure Act, the required notice and publication of a proposed rule must be made not less than 30 days prior to the affective date thereof.

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43. On or about July 17, 1972, defendants issued Operating Instructions, implementing, as of August 1, 1972, its aforementioned policy of discriminating between deportable aliens with lawful resident immediate relatives, and deportable aliens with United States citizen immediate relatives; on or about April 10, 1973, defendants issued further Operating Instructions creating a cut-off date of April 10, 1973, for the application of its policy of discriminating against relatives of permanent resident aliens. Both such instruction constituted statements and policies of general applicability and future effect, designed to implement and prescribe policy, within the meaning and intent of the Administrative Procedure Act.

44. At no time have defendants published or caused to be published the aforementioned Operating Instructions in the Federal Register, or permitted the public to comment thereupon as required by the expressed terms of the Administrative Procedure Act.

45. The aforementioned Operating Instructions are invalid and unlawful, being wrongfully implemented in violation of the provisions of the Administrative Procedure Act.

46. Jurisdiction of this Court is claimed by virtue of 5 U.S.C. Section 702, Section 704, and Section 706(2)(a); 8 U.S.C. Section 1329; 28 U.S.C. Section 2201; 28 U.S.C. Section 1346; and 28 U.S.C. Section 1651. Venue in this District is claimed by virtue of 28 U.S.C. Section 1391(e).

WHEREFORE, plaintiffs demand judgment against defendant as follows:

(A) Declaring that the policy of defendants which discriminates between deportable aliens with United States

citizen immediate relatives, and those with lawful permanent resident immediate relatives and between those with lawful permanent residentrelatives on the basis of their presence in the United States, and the existence of the relationship before April 10, 1973, was adopted in a manner which is violative of the Administrative Procedure Act.

(B) Enjoining defendants from deporting the deportable alien plaintiffs, or any other aliens, under such policy until defendant has published in the Federal Register its instructions implementing the aforesaid policy, and a period of 30 days has elapsed.

(C) Granting such other and further relief as may seem just and proper.

AS A SIXTH CAUSE OF ACTION ON BEHALF OF RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT, AND YANICK PETIT, AND ON BEHALF OF ALL ALIENS IN THE UNITED STATES SIMILARLY SITUATED

47. Plaintiffs hereby reassert and incorporate the allegations in paragraphs 1,2,3,4,5,6,7,8,9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36.

48. The aforesaid policy of defendants which makes decisions as to staying or failing to stay the deportation of immediate relatives of citizens and of residents of the United States, in the manner set forth hereinafter, is the result solely and exclusively of directions and instructions issued to the Commission of the Immigration & Naturalization Service by Hon. Peter W. Rodino, Jr., Chairman of the House Subcommittee on Immigration, Nationality & International Law of the House of Representatives, and was not as a result of the considered judgment and decision of the said Commissioner, in

the exercise of his own judgment and discretion. The aforementioned discriminatory policies are those which (a) permit spouses of American citizens to remain while awaiting visa processing, but not the spouses of resident aliens, unless the alien spouse was in the United States, and married to the permanent resident prior to April 10, 1973.

49. Defendants adherence to the policy set forth in such directive constitutes an unlawful abdication and delegation of the power conferred upon the Executive Branch of Government by the Immigration and Nationality Act, as amended, of the United States, and constitutes a violation of the principle of separation of powers embodied in the Constitution of the United States.

50. Jurisdiction of this Court is claimed by virtue of 5 U.S.C. Section 702, Section 704, and Section 706(2)(a); 8 U.S.C. Section 1329; 28 U.S.C. Section 2201; 28 U.S.C. Section 1346; and 28 U.S.C. Section 1651. Venue in this District is claimed by virtue of 28 U.S.C. Section 1391(e).

WHEREFORE, plaintiffs demand judgment against defendants as follows:

(A) Declaring that the policy of defendants which discriminates between deportable aliens of the United States citizen immediate relative, and those with permanent residence immediate relatives, and between those with lawful permanent resident relatives, on the basis of their presence in the United States, and the existence of the relationship before April 10, 1973, is unlawful.

(B) Enjoining defendants from discriminating between deportable aliens with United States citizen immediate

relatives and between those with lawful permanent resident relatives on the basis of their presence in the United States and the existence of the relationship before April 10, 1973, in the granting of stays of deportation.

(C) Enjoining defendants deporting plaintiffs and all aliens similarly situated from the United States until their request for stays of deportation has been adjudicated under the same policies and standards which apply to similar requests from deportable aliens with United States citizens immediate relatives, and deportable aliens where the relationship existed prior to April 10, 1973.

(D) Granting such other and further relief as may seem just and proper.

Yours, etc.

FRIED FRAGOMEN & DEL REY, P.C.

Attorneys for Plaintiffs
515 Madison Ave.
New York, N.Y.
Tel. No. 212 - 583-8555

By: _____
ELMER FRIED

AUSTIN T. FRAGOMEN, JR.

MARTIN L. ROTHSTEIN,

Of Counsel.

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JUDGE GAGLIARDI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 M. 3682

RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT, and YANICK PETIT, on Behalf of Themselves, and all Aliens in the United States Similarly Situated,

Plaintiffs,

v.

JAMES F. GREEN, as Commissioner of the Immigration & Naturalization Service; and SOL MARKS as New York District Director of the United States Immigration & Naturalization Service,

Defendants.

ORDER TO SHOW CAUSE

TO STAY DEPORTATION WITH A STAY

1. It appearing from the annexed affidavit of Austin T. Fragomen, Jr. Esq., sworn to August 24, 1973, that an action has been filed in this Court to enjoin defendants from deporting plaintiffs Rodolphe Noel and Eddy Antoine Petit, and to enjoin defendants James F. Green from continuing to implement anywhere in the United States, and Sol Marks from continuing to implement in the New York District of the Immigration & Naturalization Service, a policy which discriminates in granting stays of deportation to deportable aliens who are natives of the Western Hemisphere and have close relatives who are citizens of the United States, and enforcing the departure of the deportable aliens who are natives of the Western Hemisphere and have close relatives who are lawful permanent resident aliens, and further, granting stays of deportation to deportable aliens who are natives of the Western Hemisphere and have close relatives who are lawful permanent resident aliens where the deportable alien was present in the United States, and the relationship existed

prior to April 10, 1973, and enforcing departure of such aliens under similar circumstances where the deportable alien entered the United States after April 10, 1973, or the relationship creating the close relation arose after April 10, 1973; and it further appearing that plaintiffs move by this Order to Show Cause for an injunction pendente lite to restrain the deportation of Rodolphe Noel and Eddy Antoine Petit, and to restrain defendants from continuing to implement its aforesaid policy until the case can be heard in due course; and it further appearing that without an interim stay pending the hearing and determination of this motion for an injunction pendente lite, the plaintiffs herein might be deported, and thus make moot this action as to said plaintiffs, as well as this motion, it is now

ORDERED, that defendant James F. Green, and Sol Marks, or their attorney, show cause before this Court on the 10th day of ~~August~~ September, 1973, in Room 110 of the United States Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, at 10:00 AM of that day or as soon thereafter as Counsel can be heard, why an order should not be made herein enjoining defendant from deporting the said plaintiffs from the United States, and enjoining the continued implementation of the aforesaid discriminatory policy until the hearing and determination of this action, and it is further

ORDERED, that pending the hearing and determination of this motion, the defendant be, and hereby are, stayed from deporting plaintiffs Rodolphe Noel and Eddy Antoine Petit, from the United States.

Service of a copy of this Order shall be sufficient

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if served personally on the defendant, Sol Marks, AND ~~or~~ on the United States Attorney, on or before 5 P.M. of the 27th day of AUGUST, 1973.

UNITED STATES DISTRICT JUDGE

DATED: New York, New York
August 24, 1973.

Issued at: 12:30 p.m.

Consented to
Paul J. Curran
by Dwight P. Marks

24a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT, and YANICK PETIT, On Behalf of Themselves, and all Aliens in the United States Similarly Situated,

Plaintiffs,

v.

JAMES F. GREEN, as Commissioner of the Immigration & Naturalization Service; and SOL MARKS, as New York District Director of the United States Immigration & Naturalization Service,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

AUSTIN T. FRAGOMEN, JR., being duly sworn, deposes and says:

1. I am an attorney in the law firm of Fried, Fragomen & Del Rey, P.C., attorney for Plaintiffs, and make this affidavit in support of the motion for an injunction pendente lite to restrain defendants James F. Green, and Sol Marks, from deporting plaintiffs Rodolphe Noel and Eddy Antoine Petit, from the United States, and from continuing to implement a policy which discriminates in granting stays of deportation to deportable aliens who have United States citizen immediate relatives and requiring the departure of deportable aliens who have identical relationships to lawful permanent resident aliens, and which policy further discriminates by granting stays of deportation to deportable aliens who have lawful permanent resident relatives

where the deportable alien was present in the United States and the relationship existed prior to April 10, 1973, and requiring the departure of such aliens who were either not in the United States or did not have such a relationship before April 10, 1973.

2. A copy of the Complaint herein is attached to these papers and will have been filed with the Court by the time this motion is submitted to the Court.

3. This motion is made by order to Show Cause, instead of Notice of Motion, in order to request an interim stay of deportation pending determination of the Motion, for if no stay is granted, the action will be mooted as to plaintiffs who will imminently be ordered to surrender for deportation. Plaintiff Rodolphe Noel must surrender for deportation on August 28, 1973, and Plaintiff Eddy Petit has been notified that he will be ordered to surrender imminently.

4. This action is one brought by plaintiffs Rodolphe Noel, Emiris Noel, Eddy Antoine Petit and Yanick Petit, on behalf of themselves, and on behalf of all aliens in the United States similarly situated to enjoin a policy of defendants which plaintiffs contend is arbitrary, capricious, and unreasonable, a violation of the constitutional guarantee of equal protection of laws, of the administrative procedure act, and of the constitutional principle of separation of powers. On information and belief, the policy is applied by defendants to prevent certain Western Hemisphere aliens whose eligibility for immigrant visas has been approved, or which is about to be approved, from remaining in the United States pending the availability of a visa at an American Consulate abroad. The intentional distinction made by defendants is between deportable Western Hemisphere

aliens who have close relatives who are permanent residents of the United States, and those who have identical close relatives who are citizens of the United States. On information and belief, defendants have routinely permitted deportable Western Hemisphere aliens to remain in the United States pending visa availability if they have a United States citizen immediate relative, but have deported and continue to deport Western Hemisphere aliens in identical situations who have immediate relatives who are permanent residents. On information and belief, in applying the aforementioned discriminatory policies to close relatives of permanent residents of the United States who are awaiting visa availability, defendants have utilized an arbitrary and capricious cut-off date of April 10, 1973. Pursuant to such cut-off date, Western Hemisphere natives who are spouses or unmarried sons or daughters of permanent residents are not considered eligible for discretionary deferred departure relief unless both the relationship and the presence of the effected alien in the United States were in effect on April 10, 1973.

5. On information and belief, the aforementioned policy of defendants which was implemented by Operating Instructions issued on July 17, 1972, to be effective July 31, 1972, resulted solely and entirely from a directive issued to Raymond M. Farrell, then Commissioner of the Immigration & Naturalization Service, on or about June 27, 1972, by Representative Peter W. Rodino, Jr. of the United States House of Representatives, serving as Chairman of Subcommittee Number 1 (the Immigration and Nationality Subcommittee) of the Judiciary Committee. A copy of such directive, and implementing Operating Instructions, are attached hereto as Exhibits A and B, respectively.

6. On information and belief, such memorandum and contemporaneous oral communication from Representative Peter W. Rodino, Jr., indicated that Western Hemisphere aliens with permanent resident spouses, or close relatives, be henceforth forbidden to remain in the United States pending visa availability.

7. On information and belief, the aforementioned directive and policy was implemented until March 28, 1973, when further directives were issued by Representative Peter W. Rodino, Jr. (then Chairman of the House Judiciary Commiotee) to the Commissioner of the Immigration and Naturalization Service, indicating that said policy was to no longer be implemented, and that aliens who were natives of the Western Hemisphere and close relatives of permanent residents, should be allowed to remain in the United States pending visa processing abroad. Exhibit C is a reprint of that letter. On information and belief, the Immigration and Naturalization Service, after orally receiving the approval of Representative Peter W. Rodino, Jr., subsequently issued an Operating Instruction which indicated that both close relatives of citizens, and close relatives of permanent residents awaiting visa availability would be routinely granted discretionary deferred departure relief, but that such deferred departure relief would not be granted to close relatives of permanent residents if either their relationship to the permanent resident or their presence in the United States occurred subsequent to the date of April 10, 1973.

8. Attached hereto, as Exhibit D, is a letter dated January 22, 1973, from Raymond F. Farrell, then Commissioner of the United States Immigration & Naturalization Service, to Mr. Edward J. Ennis, Chairman of the Board of Directors of the

American Immigration and Citizenship Conference. Such letter indicates that the Service's change regarding deferred departure status was adopted in response to the recommendation of Sub-committee #1 of the House Judiciary Committee. Exhibit E is a letter from Associate Commissioner Greene to Leon Rosen, Chairman of the Association of Immigration & Nationality Lawyers dated April 3, 1973, stating that the change in the August, 1972 policy was the result of efforts by Congressman Peter W. Rodino, Jr., then Chairman of the House Judiciary Committee. In accordance with existing policy, an extension of departure time can be granted to spouses of lawful permanent resident aliens if they were married on or before April 10, 1973, and that a request relating to any such marriage which occurred subsequently to April 10, 1973, must be denied.

9. The full brunt of the deliberate and discriminatory policy being implemented by the Immigration and Naturalization Service is felt most acutely by the plaintiffs in this action. The two sets of plaintiffs, are each husband and wife. In each instance the husband is an alien present in the United States who has formally established entitlement to an immigrant visa, and the wife is a permanent resident of the United States. In each such instance, on information and belief, the husband need only wait the availability of an immigrant visa under the Western Hemisphere numerical limitation in order to become a lawful permanent resident of the United States. On information and belief, defendants have refused to grant each such husband a stay of deportation pending visa availability solely on the ground that his spouse is not a citizen of the United States and that his marriage took place after April 10, 1973. On information and belief, each such plaintiff husband would be

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permitted by defendants to remain in the United States pending the availability of a Western Hemisphere visa number if he were married to a citizen of the United States, rather than to a lawful permanent resident thereof, or if his marriage had taken place prior to April 10, 1973.

10. On information and belief, the deportation of the plaintiff husbands will create an emotional, spiritual, and economic burden upon the plaintiff wives.

WHEREFORE, plaintiffs request that this court grant an injunction pendente lite restraining defendants from deporting plaintiffs Rodolphe Noel and Eddy Antoine Petit, from the United States until this case can be determined, and restraining defendants from continuing to implement any policy which discriminates in the granting of stays of deportation between aliens who have immediate relatives in the United States who are United States citizens, and those who have identical close relatives in the United States who are lawful permanent residents thereof, or in discriminating by granting stays of deportation to deportable aliens who are close relatives of lawful permanent resident aliens where the deportable alien was present in the United States and the relationship existed before April 10, 1973, but refusing to stay deportation where either the relationship arose after April 10, 1973, or the alien came to the United States after that date. A memorandum of law is being submitted to the Court in connection with this motion.

Austin T. Fragomen, Jr.
AUSTIN T. FRAGOMEN, JR.

Sworn to before me this
24 day of August, 1973.
Bernice Siegel
State of New York
Qualified - Nassau County
My Comm. expires 3/30/75
No 45-0035

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20515

30a

June 27, 1972

Honorable Raymond F. Farrell, Commissioner
Immigration and Naturalization Service
Department of Justice
119 D Street, N. E.
Washington, D. C. 20536

Dear Mr. Commissioner:

Hearings conducted by this Subcommittee over the past year in the field of immigration law enforcement have pointed up the unfavorable influence which employment by illegal aliens is having on the domestic job market. This is, of course, particularly evident in those areas of the United States having a high rate of unemployment among Americans.

With this in mind, the Subcommittee believes that the Service practice of routinely permitting alien professionals and certain natives of the Western Hemisphere to remain in the United States until their visa priority dates are reached is no longer justifiable. These non-resident aliens and their dependents are competing for jobs with unemployed residents of the United States, and their numbers should not be allowed to increase further. The Subcommittee therefore recommends that this practice be terminated immediately, but that those aliens who have already been granted permission to remain pending visa availability be allowed to stay if they maintain the qualifications on which the privilege was given originally.

The Subcommittee is of the opinion that existing provisions of the Immigration and Nationality Act, particularly section 101(a)(15)(H)(i), are sufficient to provide for the admission of professionals to the United States to fill those positions which cannot be filled by United States residents.

Kindest regards.

Sincerely,

PETER W. RODINO, JR.
Chairman

PWR:ch

Exhibit A to Affidavit

UNITED STATES GOVERNMENT

Memorandum

31a

CO 242.1-P

TO : All Regional Commissioners
All District Directors
All Files Control Offices

DATE: July 17, 1972

FROM : Associate Commissioner
Operations

SUBJECT: Voluntary Departure for members of the professions and persons having exceptional ability in the sciences or arts "(PSA)"; and for certain Western Hemisphere natives.

It has become apparent that unlawful employment of nonresident aliens in the United States has been having an increasingly unfavorable effect on the domestic job market. Hearings conducted by Subcommittee No. 1 of the House of Representatives Committee on the Judiciary over the past year have tended to emphasize that fact, and the Subcommittee has now recommended to the Service that the practice be terminated of routinely permitting alien professionals and certain Western Hemisphere natives to remain in the United States pending the availability of immigrant visas.

The Service has accepted the Subcommittee's recommendations. Accordingly, OI 242.10(a)(6) is terminated effective July 31, 1972, except for the following:

1. An alien already in voluntary departure status under that Operations Instruction.

2. A "PSA" alien in the United States on July 31, 1972, for whom an approved third or sixth preference petition was filed on or before that date

3. A "PSA" native of an independent Western Hemisphere country or of the Canal Zone who is in the United States on July 31, 1972, and who had applied for an immigrant visa on or before that date.

Authorization for voluntary departure for such excepted aliens shall continue only for so long as the related petitions and visa applications remain valid and the aliens retain "PSA" eligibility. Similarly, such excepted aliens shall continue eligible for advance parole as presently provided. Nothing in this memorandum is intended to affect the grant

of voluntary departure to any alien eligible for that privilege on other grounds, nor to preclude temporary admission of and extension of stay of "PSA" aliens in accordance with section 101(a)(15)(H)(i) of the Act.

On and after July 31, 1972, a native of the Western Hemisphere who is the spouse, parent, or child of an alien lawfully admitted for permanent residence will not routinely be granted extended departure time to await visa issuance. The foregoing relationships, in and of themselves, are not to be considered a basis for granting extended departure time. Only those aliens within the purview of OI 242.10(a)(7) will be permitted extended departure time to await visa issuance. Those cases granted this privilege prior to July 31, 1972, will be continued in their present status without regard to the new criteria. However, the foregoing does not preclude a stay of departure in these cases under OI 242.10(a)(8) when compelling factors warranting favorable consideration are present. Stays under this category are to be granted for so long as the compelling factors are present, regardless of when visa issuance could be expected. A careful review is to be made of each case presented to determine whether or not compelling factors are present.

The Association of Immigration and Nationality Lawyers, the American Council of Voluntary Agencies for Foreign Service, Inc., and the National Association for Foreign Student Affairs have been furnished a copy of this memorandum. District Directors should notify all interested local organization in accordance with the sample attached.

James F. Greene

Attachment

News

AMERICAN IMMIGRATION AND CITIZENSHIP CONFERENCE

509 MADISON AVENUE · NEW YORK, N. Y. 10022

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April 2, 1973

Special Bulletin No. 9

CONGRESSMAN RODINO ASKS FOR DELAY OF ENFORCED DEPARTURE OF CERTAIN WESTERN HEMISPHERE ALIENS

As reported in AICC NEWS, Vol, XVIII, No. 4, the Immigration and Naturalization Service at the suggestion of the House Judiciary Subcommittee on Immigration and Nationality ceased its policy of granting automatic deferred departure status for aliens in the professional classes, and natives of the Western Hemisphere with close lawful resident alien relatives in the United States. Noting that Subcommittee No. 1 is in the process of considering new legislation regarding the Western Hemisphere immigration situation, Rep. Rodino, Chairman of the House Judiciary Committee, suggested to Commissioner of Immigration and Naturalization, Raymond F. Farrell in a letter of March 28, 1973 as follows:

Dear Mr. Commissioner:

I am sure you are aware that the Members of Subcommittee No. I of this Committee are commencing extensive hearings on legislation designed to establish a preference system for the Western Hemisphere.

My bill, H.R. 981, to amend the Immigration and Nationality Act in that respect is under active consideration by the Subcommittee. Knowing of their diligence and their awareness of the need for such legislation, it is my firm belief that legislation equalizing the two hemispheres will be favorably acted upon by the Committee during the current session of the Congress.

With that in mind, coupled with the fact that legislation permitting the adjustment of status of certain natives of the Western Hemisphere has already been ordered favorably reported to the House of Representatives, I believe that you should consider issuing instructions to your Field Offices to delay enforcing departure of natives of the Western Hemisphere who are immediate relatives as defined in section 201(b) of the Immigration and Nationality Act; the unmarried sons or daughters of United States citizens; and the spouse or unmarried son or daughter of an alien who has been lawfully admitted to the United States for permanent residence.

I feel certain that you will agree that this course of action will alleviate much hardship and that the interest of humanity will be better served. The uniting of families has been paramount in all consideration of legislation in the field of immigration.

Kindest regards.

Sincerely,

(signed) PETER W. RODINO, JR.
Chairman

33a

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
WASHINGTON, D.C. 20536

PLEASE ADDRESS REPLY TO

OFFICE OF THE COMMISSIONER

JAN 22 1973

AND REFER TO THIS FILE NO.

CO 242.1-P

Dear Mr. Ennis:

I am responding to your letter of January 17, 1973, commenting on the recent change of policy regarding deferred departure status.

The statement transmitted with your letter correctly states that the policy change was adopted in response to the recommendation of Subcommittee No. 1 of the House Judiciary Committee. That Subcommittee believed that our policy rested on a doubtful legal foundation and was producing undesirable consequences in the administration of the law. Your statement was addressed to the Subcommittee and requested it to reconsider this matter. I assume you will be receiving a response from the Subcommittee. Under the circumstances, it seems to me that any further comment by me would be inappropriate.

I appreciate your interest.

Sincerely,

Raymond F. Farrell

Raymond F. Farrell
Commissioner

Mr. Edward J. Ennis
Chairman, Board of Directors
American Immigration and Citizenship Conference
509 Madison Avenue
New York, N. Y. 10022

, 3Da

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
WASHINGTON, D.C. 20536

APR - 3 1973

CO 242.1-P

Leon Rosen, President
Association of Immigration and
Nationality Lawyers
60 East 42nd Street
New York, New York 10017

Dear Mr. Rosen:

Reference is made to letter addressed to you on July 17, 1972, regarding the granting of voluntary departure to certain Western Hemisphere natives.

Upon consideration of a recommendation recently made by the Chairman of the House of Representatives Committee on the Judiciary, it has been decided that certain changes will be made in the Service policy on this matter.

Effective immediately, under the changed policy, a Western Hemisphere native will, as a matter of discretion, be granted extended voluntary departure if he is admissible to the United States as an immigrant and he is an immediate relative of a United States citizen as defined in section 201(b) of the Immigration and Nationality Act, as amended, or is the unmarried son or unmarried daughter of a United States citizen, or is the spouse or unmarried son or unmarried daughter of an alien who has been lawfully admitted to the United States for permanent residence.

Field offices of this Service are being advised accordingly.

Sincerely,

James F. Greene

James F. Greene
Associate Commissioner
Operations

Exhibit 3 to Affidavit

35a

20 West Dresdner
New York, N.Y.

A20 090 095 ED/JLL

July 23, 1973

Mr. Gregorio L. TORRES-Casiro
106 Westchester Avenue, 2nd Floor
Portchester, N.Y.

Dear Sir:

Reference is made to the request for an extension of time to depart the United States submitted by your attorney on July 18, 1973.

Please be advised that in accordance with existing policy an extension of departure time can be granted to spouses of lawful permanent resident aliens if they were married on or before April 10, 1973. In view of the fact that you married on April 12, 1973 the request must be denied.

You will soon be informed of the date on which you must surrender for your deportation to Peru.

Very truly yours,

SOL PARIS
DISTRICT DIRECTOR
NEW YORK DISTRICT

cc: COHEN & TAFFET
111 West 42nd Street
New York, N.Y., 10036

JLL/ab

EXHIBIT F TO AFFIDAVIT

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SHW:ais
73-2729

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT, and YANICK PETIT, on Behalf of Themselves, and all Aliens in the United States similarly situated,

Plaintiffs,

-v-

JAMES F. GREEN, as Commissioner of the Immigration & Naturalization Service, and SOL MARKS, as New York District Director of the United States Immigration & Naturalization Service,

Defendants.

AFFIDAVIT IN OPPOSITION TO A MOTION FOR A PRELIMINARY INJUNCTION

73 Civ. 3682 LPG

STATE OF NEW YORK)
COUNTY OF NEW YORK : SS.:
SOUTHERN DISTRICT OF NEW YORK)

STANLEY H. WALLENSTEIN, being duly sworn, deposes and says:

1. I am a Special Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, and as such, I am in charge of this action. I make this affidavit in opposition to the plaintiffs' motion for a preliminary injunction restraining their deportation pending the determination of this declaratory judgment action. This affidavit is based in pertinent part on the documents annexed hereto and marked as exhibits and on the administrative files of the Immigration and Naturalization Service (the "Service"), relating to the four named plaintiffs.

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73-2729

2. This is a declaratory judgment action brought by four named plaintiffs on their own behalf and on behalf of an allegedly similarly situated class of aliens. Two of the plaintiffs, Rodolphe Noel (Noel) and Eddy Antoine Petit (Petit) are aliens illegally in the country and are under outstanding warrants of deportation. Noel and Petit are married, respectively, to the other two named plaintiffs, Emiris Noel (Mrs. Noel) and Yanick Petit (Mrs. Petit), both of whom are lawful permanent resident aliens. Because they are married to permanent residents, Noel and Petit are in a position to apply for permanent resident immigration visas but must wait about two years before the visas will become available under the quota for the Western Hemisphere. Noel and Petit have requested the District Director of the New York District Office to grant them permission to remain in this country during the waiting period. The District Director has declined to grant such permission. The plaintiffs now seek review of the District Director's decisions, alleging them to be arbitrary, capricious and an abuse of discretion. In this motion for a preliminary injunction, the plaintiffs seek to enjoin the District Director from executing the deportation orders until the action is determined on the merits.

3. Noel is a native and citizen of Haiti. He was admitted to the United States on May 24, 1969, as a non-immigrant visitor for pleasure, authorized to remain

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73-2729

in this country for two months. He remained illegally beyond his allotted time and on June 15, 1972, he was apprehended by investigators of the Service.

4. The Service commenced deportation proceedings against Noel on June 16, 1972, by issuing an order to show cause and notice of hearing (Exhibit "A"). At the hearing held on June 27, 1972, Noel admitted that he was deportable as an overstay visitor and requested the privilege of voluntary departure. To obtain this privilege he represented to the special inquiry officer that he was willing and able to leave the country at his own expense within whatever time the Government prescribed. Accordingly, the special inquiry officer granted him voluntary departure until September 27, 1972, and provided that if he failed to leave by that date, or within any extension of that date as may be granted by the district director, that he be deported to Haiti (Exhibit "B").

5. Noel never left the country and on July 12, 1973, the Service issued a warrant of deportation (Exhibit "C"). He was then ordered by the Service to report on August 21, 1973 for deportation to Haiti. On the day previous, Noel informally requested the District Director to extend the time for voluntary departure. The basis of his request was that he was the spouse of a permanent resident alien. He had married the plaintiff Mrs. Noel on April 19, 1973, in New York. Noel was applying for an immigration visa on the basis of his marriage to Mrs. Noel and requested that the date for voluntarily departure be extended until the visa became available under the Western Hemisphere quota, a period of about two years.

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73-2729

6. The District Director orally declined to grant the relief requested but stayed deportation for seven days to allow Noel's attorney to commence this action.

7. The plaintiff Petit is also a native and citizen of Haiti. He was admitted to the United States on August 4, 1970, as a non-immigrant visitor for pleasure, authorized to remain for two months. He remained beyond his allotted time and was apprehended by Service investigators on June 7, 1973, at his place of employment.

8. The Service promptly commenced deportation proceedings against Petit by issuing an order to show cause and notice of hearing (Exhibit "D"). The hearing was held on June 8, 1973. Petit conceded that he was deportable and requested voluntary departure. The special inquiry officer granted voluntary departure until July 8, 1973, or any extension beyond that as may be granted by the district director, and ordered deportation to Haiti in the alternative. (Exhibit "E").

9. Before the time for voluntarily departure expired, Petit, on June 26, 1973, married the plaintiff Mrs. Petit. Mrs. Petit had entered the United States only seven days earlier on a permanent resident immigration visa. Petit is now applying for an immigration visa as the spouse of a permanent resident alien and faces a wait of about two years until the visa will become available under the Western Hemisphere quota.

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10. After his marriage and on the strength of it, Petit applied to the District Director for an extension of the time for voluntary departure until the visa became available. By letter dated July 18, 1973, the District Director informed Petit that his request was denied and that he was required to leave by July 27, 1973 (Exhibit "F"). Petit did not leave and on August 6, 1973, the Service issued a warrant of deportation (Exhibit "G"). Petit was thereafter ordered to report on September 5, 1973 for deportation to Haiti.

11. The District Director's decision to deny relief to Noel and Petit was in accord with a Servicewide policy which became effective April 10, 1973. The policy contained guidelines within the framework of which, the various district directors were to exercise their discretion in such cases. The policy provides that Western Hemisphere aliens who are in this country and married to lawful permanent resident aliens, may normally be granted extended voluntary departure in the exercise of discretion until an immigrant visa became available (Exhibit "H", telegram dated April 10, 1973, from the Service's Acting Commissioner, James F. Greene). However, this policy was not prospective and was expressly limited to cases then in process (Exhibit "J", telegram dated April 20, 1973, from Acting Commissioner Greene). The policy was not to apply to those aliens who entered this country after its effective date (April 10, 1973), or who acquired the requisite family relationship after that date (Exhibit "K", letter dated May 16, 1973, from Acting Commissioner Greene).

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Such aliens were not to be granted extended departure time routinely solely on the basis of the relationship but could be granted such relief if in the opinion of the district director, compelling factors in their individual case warranted such relief (Exhibit "L", Service Operation Instruction, No. 242.10(a)(8)).

12. As is indicated in Exhibit "M" attached hereto (letter from Commissioner Farrell to Congressman Smith, dated May 10, 1972), the usual policy of the Service, from 1968 to 1972, was not to permit such aliens to remain in this country unless unusual considerations were present. This was apparently not followed in the New York District which, at least until June of 1972, had routinely granted deferred departure (Exhibit "N", Memorandum from the Regional Commissioner, dated June 9, 1972). The policy to enforce departure, however, became uniform throughout the Service largely as the result of recommendations received from Congressman Rodino (Exhibit "O", letter from Congressman Rodino to Commissioner Farrell, dated June 27, 1972). Congressman Rodino advised that hearings conducted by his subcommittee had indicated that employment of illegal aliens in this country was having an adverse effect on the domestic labor market. With this in mind, the Service informed all its district directors that as of July 31, 1972, Western Hemisphere aliens should not routinely be granted extended departure time to await issuance of a visa solely on the basis of their relationship to a permanent resident alien. The letter specified

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that such aliens could be granted stays of departure, in individual cases, where compelling factors warrant such relief, and that aliens previously granted deferred departure would not be affected (Exhibit "P", letter from Commissioner Greene, dated July 17, 1972).

13. This Servicewide policy of not granting extended departure time to relatives of permanent resident aliens remained in effect until April of 1973. As is indicated in paragraph 11 of this affidavit, the policy was then modified, effective April 10, 1973, so as to allow such aliens normally to remain pending the issuance of a visa, if they were present in this country, and had the requisite familial relationship on or before April 10, 1973. Western Hemisphere aliens who did not fit within this category, i.e., who enter this country, or obtained the requisite family relationship after April 10, 1973, continue to fall within the former policy. Such aliens are not to be granted deferred departure routinely, solely on the basis of the relationship, but must establish compelling factors, which, in the opinion of the district director would warrant such relief.

14. The policy of forebearance towards Western Hemisphere aliens in this country and married to permanent residents as of April 10, 1973, was prompted by a second letter from Congressman Rodino to the Service's Commissioner dated March 28, 1973 (Exhibit "Q", Special Bulletin from American Immigration and Citizenship Conference, containing reprint of letter). The letter informed of legislation pending in the House of Representatives which would radically

change the rules regarding immigration from the Western Hemisphere and would have an important effect on those aliens who are close relatives of permanent resident aliens. As a result of this advice, the Service formulated its present policy. The policy was intended, however, to cover only cases then in process (see Exhibit "H"), and was not intended as an invitation to such aliens to thereafter enter this country, acquire the specified relationship, and remain unlawfully (see Exhibit "J", para. 3.).

15. Noel and Petit were in this country prior to April 10, 1973, but did not acquire the specified relationship until after that date. They do not come within the 1973 modification of policy. Therefore, they are not entitled to deferred departure solely on the basis of their relationship to a permanent resident. They could obtain such relief if they could establish to the satisfaction of the district director that their individual case involves compelling factors warranting favorable consideration (see Exhibit "L", Service Operation Instruction, No. 242.10(a)(8)). They have however, alleged only the fact of their marriages. They made no allegation to the District Director of any compelling factors peculiar to their cases warranting deferred departure. Accordingly, the District Director's denial of relief was a proper exercise of discretion.

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73-2729

WHEREFORE, it is prayed that the plaintiffs' motion for a preliminary injunction staying deportation be denied in all respects and that the temporary restraining order be dissolved.

STANLEY H. WALLENSTEIN
Special Assistant
United States Attorney

Sworn to before me this

17 day of September, 1973.

WALTER G. BRANNON
Notary Public, State of New York
Qualified in Kings County
Certified in New York County
Term Expires March 30, 1975

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

In the Matter of)
RODOLPHE, NOEL)
Respondent.)

To: Noel Rodolphe (name) File No. A19 525 768

638 Wilson Avenue, Apt. 2L, Brooklyn, New York
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Haiti and a citizen of Haiti;
3. You entered the United States at San Juan, Puerto Rico on or about May 21, 1969 (date);
4. At that time you were admitted as a nonimmigrant visitor for pleasure and were authorized to remain in the United States until August 23, 1969.
5. You remained in the United States after August 23, 1969 without authority.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Sec. 101(a) (15) of said act you have remained in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at 20 W. Broadway, New York, New York, 14th floor on June 27, 1972 at 8:45 a.m., and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: June 16, 1972

IMMIGRATION AND NATURALIZATION SERVICE

(signature and title of issuing officer)
DISTRICT DIRECTOR
NEW YORK DISTRICT
(City and State)

Form I-221
(Rev. 3-30-67)

Bond Revoked Yes ☐ No ☑
T.A. Assigned Yes ☑ No ☐

(over)

EXHIBIT "A"

46a

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS. THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

When you appear you may, if you wish, admit that the allegations contained in the Order to Show Cause are true and that you are deportable from the United States on the charges set forth therein. Such admission may constitute a waiver of any further hearing as to your deportability. If you do not admit that the allegations and charges are true, you will be given reasonable opportunity to present evidence on your own behalf, to examine the Government's evidence, and to cross-examine any witnesses presented by the Government.

You may apply at the hearing for voluntary departure in lieu of deportation. Moreover, if you appear to be eligible to acquire lawful permanent resident status the special inquiry office will explain this to you at the hearing and give you an opportunity to apply.

You will be asked during the hearing to select a country to which you choose to be deported in the event that your deportation is required by law. The special inquiry officer will also notify you concerning any other country or countries to which your deportation may be directed pursuant to law; and upon receipt of this information, you will have an opportunity to apply during the hearing for temporary withholding of deportation if you believe you would be subject to persecution in any such country on account of race, religion, or political opinion.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service without further notice, or in a determination being made by the special inquiry officer in your absence.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

Before: ______________________ (signature of respondent)

______________________ (signature and title of witnessing officer)

______________________ (date)

CERTIFICATE OF SERVICE

This order and notice were served by me on 6-16-72 (date) in the following manner:

by personal service French language

French

Samuel L. [illegible] (signature and title of employee or officer)

[illegible signature]
Interpreter

ONLY COPY AVAILABLE

47a

Clipps

File No. A19 525 768

UNITED STATES OF AMERICA:

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

In the Matter of

RODOLPHE, NOEL

Respondent.

In Deportation Proceedings Under Section 242 of the Immigration and Nationality Act

DECISION OF THE SPECIAL INQUIRY OFFICER

The above-named respondent having appeared before me for hearing on this date, pursuant to the Order to Show Cause in this proceeding, and having admitted that the factual allegations contained therein are true, and having further admitted that (s)he is deportable from the United States on the charges set forth therein, I am satisfied and have concluded that deportability has been thereby established.

Respondent has made application solely for voluntary departure in lieu of deportation.

ORDER: It is ordered that in lieu of an order of deportation the respondent be granted voluntary departure without expense to the Government on or before September 27, 1972 (Date), or any extension beyond such date as may be granted by the district director, and under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondent shall be deported from the United States to Haiti on the charge(s) contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept the respondent into its territory, the respondent shall be deported to _____.

Date: 6-27-72

Place: NYC

(Special Inquiry Officer)

Copy of this decision has been served on the respondent.

Appeal: Waived-reserved

Final Order
6-27-72
ejo

(Special Inquiry Officer)

Form I-39
(Rev. 1-5-68)

EXHIBIT "B"

48a

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

WARRANT OF DEPORTATION

No. A20 104 071

To any Officer or Employee of the United States Immigration and Naturalization Service.

After due hearing before an authorized officer of the United States Immigration and Naturalization Service, and upon the basis thereof, an order has been duly made that the alien PETIT, Eddy Antoine

who entered the United States at New York,New York

on the 4th day of August , 19 70, is subject to deportation under the following provisions of the laws of the United States, to wit:

Section 241 (a)(2) of the Immigration and Nationality Act.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, command you to take into custody and deport the said alien pursuant to law, at the expense of the

Appropriation "Salaries and Expenses, Immigration and Naturalization Service, 19[illegible]", including the expenses of an attendant if necessary.

Signature: [illegible]
HAROLD J. GRACE
Title: ASSISTANT DISTRICT DIRECTOR FOR DEPORTATION

Date: August 6, 1973

Place: New York,New York

Form I-205
(Rev. 8-4-72) N

EXHIBIT "C"

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

In the Matter of)
)
PETIT, EDDY ANTOINE)
Respondent.)

To: _____ File No. A20 104 072
(name)

_____
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Haiti
and a citizen of Haiti;
3. You entered the United States at New York, N.Y. on
or about August 4, 1970
(date);

4. At that time you were admitted as a nonimmigrant visitor for pleasure.

5. You have been authorized to remain in the United States until October 4, 1970

6. You remained in the United States thereafter without authority.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Sec. 101(a) (15) of said act you have remained in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at
20 W Broadway, New York, N.Y., 14th floor
on June 8, 1973 at 1:00 p.m., and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: June 7, 1973

IMMIGRATION AND NATURALIZATION SERVICE

_____
(signature and title of issuing officer)
ACTING DISTRICT DIRECTOR
NEW YORK DISTRICT
(City and State)

Form I-221
(Rev. 3-30-67)

(over)

EXHIBIT "D"

1 SDa

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS. THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

When you appear you may, if you wish, admit that the allegations contained in the Order to Show Cause are true and that you are deportable from the United States on the charges set forth therein. Such admission may constitute a waiver of any further hearing as to your deportability. If you do not admit that the allegations and charges are true, you will be given reasonable opportunity to present evidence on your own behalf, to examine the Government's evidence, and to cross-examine any witnesses presented by the Government.

You may apply at the hearing for voluntary departure in lieu of deportation. Moreover, if you appear to be eligible to acquire lawful permanent resident status the special inquiry office will explain this to you at the hearing and give you an opportunity to apply.

You will be asked during the hearing to select a country to which you choose to be deported in the event that your deportation is required by law. The special inquiry officer will also notify you concerning any other country or countries to which your deportation may be directed pursuant to law; and upon receipt of this information, you will have an opportunity to apply during the hearing for temporary withholding of deportation if you believe you would be subject to persecution in any such country on account of race, religion, or political opinion.

Failure to attend the hearing at the time and place designated hereon may result in your arrest and detention by the Immigration and Naturalization Service without further notice, or in a determination being made by the special inquiry officer in your absence.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

Before: _____
(signature and title of witnessing officer)

_____
(signature of respondent)

6/7/73
(date)

CERTIFICATE OF SERVICE

This order and notice were served by me on 6/7/73 (date) in the following manner:

_____
(signature and title of employee or officer)

File No. A20 104 071

UNITED STATES OF AMERICA:

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

In the Matter of
PETIT, EDDY ANTOINE

Respondent.

In Deportation Proceedings Under Section 242 of the Immigration and Nationality Act

DECISION OF THE SPECIAL INQUIRY OFFICER

The above-named respondent having appeared before me for hearing on this date, pursuant to the Order to Show Cause in this proceeding, and having admitted that the factual allegations contained therein are true, and having further admitted that (s)he is deportable from the United States on the charges set forth therein, I am satisfied and have concluded that deportability has been thereby established.

Respondent has made application solely for voluntary departure in lieu of deportation.

ORDER: It is ordered that in lieu of an order of deportation the respondent be granted voluntary departure without expense to the Government on or before Sept 8, 1973 (Date), or any extension beyond such date as may be granted by the district director, and under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall become immediately effective: the respondent shall be deported from the United States to Haiti on the charge(s) contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept the respondent into its territory, the respondent shall be deported to _____

Date: 6/8/73

Place: NYC

(Special Inquiry Officer)

Copy of this decision has been served on the respondent.

Appeal: Waived-reserved

FINAL ORDER

JUN 8 1973

(Special Inquiry Officer)

Form I-38
(Rev. 7-2-72) Y

EXHIBIT "E"

6 2A

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
20 WEST BROADWAY
NEW YORK, N.Y. 10007
JULY 12, 1973

PLEASE REFER TO THIS FILE NUMBER
A20104 071 DBTJC

Mr. Eddy A PETIT
836 CARROLL ST.
BROOKLYN, N.Y.

Please note the below checked action which has been taken in your case.

☐ You have violated the terms of your admission as a nonimmigrant. Consequently, permission previously granted you to remain in the United States is rescinded. You are required to depart from the United States at your own expense on or before _____.

☐ In accordance with a decision made in your case you are required to depart from the United States at your own expense on or before _____.

☒ Your application for an extension of time in which to depart from the United States has been DENIED. You are required to depart on or before JULY 27, 1973.

You must notify this office, Room No. 14, on or before JULY 23, 1973 of the arrangements you have made to effect your departure, including the date, place, and manner.

Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and action being taken to effect your deportation.

If there is a bond outstanding in your case, you are warned that to expedite cancellation of the bond and return of the collateral posted, you must make advance arrangements with this office to have your departure witnessed by an officer of this Service.

USE THE ENCLOSED SELF-ADDRESSED CARD TO NOTIFY THIS OFFICE REGARDING DEPARTURE ARRANGEMENTS. POSTAGE IS NOT REQUIRED. At the time of your departure, do not fail to surrender Form I-94, ARRIVAL-DEPARTURE RECORD, in accordance with instructions on that form.

POLLOCK & KRAMER, ESQ
26 COURT STREET
BROOKLYN, N.Y.

Very truly yours,
Sol Wachtler
DISTRICT DIRECTOR

FOR IMMIGRATION AND NATURALIZATION USE ONLY

Departed:

Port _____ Date _____ ☐ I-94 stamped ☐ I-530 submitted
To _____ Via _____ ☐ I-161 prepared ☐ I-156 prepared

Form I-210
(Rev 9-1-70) N

GPO 869-746

EXHIBIT "P"

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

WARRANT OF DEPORTATION

No. A19 525 768

To any Officer or Employee of the United States Immigration and Naturalization Service.

After due hearing before an authorized officer of the United States Immigration and Naturalization Service, and upon the basis thereof, an order has been duly made that the alien Rodolphe NOEL

who entered the United States at San Juan, Puerto Rico

on or about the 24th day of May, 1969, is subject to deportation under the following provisions of the laws of the United States, to wit:

Section 241 (a) (2) of the Immigration and Nationalty Act.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, command you to take into custody and deport the said alien pursuant to law, at the expense of the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1974", including the expenses of an attendant if necessary.

Signature: [signature]
Acting
Title: Assistant District Director for Deportation

Date: July 12, 1973

Place: New York District

Form I-205
(Rev. 8-4-72) N

EXHIBIT "G"

54a

[illegible] 17017 [illegible] 656606

[illegible] 1001215-[illegible]

[illegible]

[illegible] 101215Z APR 73

[illegible] JINS [illegible]

TO [illegible]/ALL FILE CONTROL OFFICES (EXCEPT FOREIGN) [illegible]

TO [illegible]/DD JINS HONOLULU HAWAII

TO [illegible]/DD USINS AGANA GUAM

TO [illegible]/DD USINS 143 PO-COURTHOUSE ANCHORAGE ALASKA

TO [illegible]/DD USINS PAN AM BLDG HATO REY SAN JUAN PR

INFO [illegible] JINS BURLINGTON VT

INFO [illegible] JINS RICHMOND VA

INFO [illegible] JINS TWIN CITIES MINN

INFO [illegible] JINS SAN PEDRO CALIF

BT

UNCLAS

EFFECTIVE IMMEDIATELY, WESTERN HEMISPHERE NATIVE MAY, AS MATTER OF DISCRETION, BE GRANTED EXTENDED VOLUNTARY DEPARTURE IF ADMISSIBLE AS IMMIGRANT AND ALIEN IS IMMEDIATE RELATIVE OF USC AS DEFINED IN SECTION 201(B), IS UNMARRIED SON OR UNMARRIED DAUGHTER OF USC, OR IS SPOUSE OR UNMARRIED SON OR UNMARRIED DAUGHTER OF LAWFUL PERMANENT RESIDENT ALIEN. SEND ALL [illegible] EXCEPT FOREIGN DETIL [illegible].

BT

APR 11 8 38 AM '73

EXHIBIT "H"

55a

All Branches Pr. Puerto

Sur

4-23

APR 23 8 46 AM '73

DISTRICT DIRECTOR

003033 [13013 MSCEV414241SUSDUPE

RAAUIJAZ RUEVDEB0047 1101820-UUUU--RUGSGCC.

JIDC

R 2018202 APR 73

FM GREENE CO JINS WASHDC

TO RUGSGCC/ALL FILE CONTROL OFFICES (EXCEPT FOREIGN)JINS

TO RUWLSBT/1/DO JINS HONOLULU HAWAII

TO RUHNSAA/1/BOGNAR USINS AGANA GUAM

TO RUEBALB/1/DO USINS 143 PO-COURTHOUSE ANCHORAGE ALASKA

TO RUEVFCG/1/DO USINS PAN-AM BLDG HATO REY PUERTO RICO

INFO RUEVDDO/1/RO JINS BURLINGTON VT

INFO RUEVDDU/1/RO JINS RICHMOND VA

INFO RUWLRAG/1/RO JINS SAN PEDRO CALIF

INFO RUCHLDA/1/RO JINS TWIN CITIES MINN

BT

UNCLAS

BEJEK APRIL 10, 1973 RE WESTERN HEMISPHERE NATIVES. POLICY IS TO BE APPLIED TO CASES NOW IS PROCESS. SUBJECTS MEETING CRITERIA ARE TO BE GIVEN EXTENDED VOLUNTARY DEPARTURE EITHER BEFORE OR AFTER PROCEEDING

ARRANGEMENTS SHOULD BE MADE BY LOCAL OFFICES TO TAKE APPROPRIATE ACTION FOP CASES PENDING BEFORE IMMIGRATION JUDGE OR BIA. BENED ALL FCO'S EXCEPT FOREIGN DETIL ROCOMS.

BT

APR 23 PM 3 17

EXHIBIT "J"

16a

UNITED STATES GOVERNMENT

Memorandum

CO 242.1-P

DATE: MAY 16 1973

TO : Regional Commissioner
San Pedro, California

FROM : Associate Commissioner
Operations

SUBJECT: Extended Voluntary Departure for Certain Western Hemisphere Aliens;
Your SW 242(a)-P and SW 103.2-P, April 23, 1973 (two memos)

Central Office letter of April 3, 1973, CO 242.1-P to the Immigration and Nationality Lawyers Association, copies of which were endorsed to Regional Commissioners and the CO teletype of April 10, 1973, set forth the change in policy concerning discretionary grant of extended voluntary departure to admissible natives of the Western Hemisphere who are immediate relatives, or who are the unmarried sons or unmarried daughters of United States citizens, or who are the spouses or unmarried sons or unmarried daughters of lawful permanent resident aliens.

With regard to the several matters raised in your memorandums, you are advised as follows:

1. The requirement that the alien be admissible does not include compliance with the labor certification provision of section 212(a)(14). The change in policy was predicated on the introduction of H.R. 981 and 982 by the Chairman of the House Judiciary Committee. Among other things, those bills would make Western Hemisphere natives eligible for adjustment of status under section 245 and would make the preference system applicable to them. As a preference alien on the basis of relationship to U. S. citizen or lawful permanent resident, an adult unmarried son or unmarried daughter born in the Western Hemisphere would, under H.R. 981, not be subject to section 212(a)(14).

2. Flagrant violators of immigration laws, in the exercise of discretion, may be refused extended voluntary departure.

3. A reasonable period of residence such as six months or longer should not be used as a criteria. If the alien was in the U. S. on April 10, 1973, remained thereafter, and had the requisite relationship on that date he may be considered eligible. The change in policy was announced for the purpose of delaying enforcement of departure of specified relatives who

EXHIBIT "K"

51a

were already in the United States. The change was not adopted as an invitation to aliens to thereafter enter this country, acquire the specified relationship, and remain unlawfully.

4. An alien who accepted public welfare for himself or his family should generally be denied extended voluntary departure unless eligible under a provision of CI 242.10(a) other than paragraph 6(ii).

5. An alien who entered illegally without inspection and requests immediate voluntary departure by signing Form I-274, notwithstanding that he is made aware that he is eligible for extended voluntary departure as an alien who was in the U. S. on April 10, 1973 with the requisite relationship, may be granted immediate voluntary departure.

6. An alien having the requisite relationship, who entered without inspection may be granted extended voluntary departure notwithstanding that pending legislation does not contemplate adjustment under section 245 for an alien who entered without inspection. Although ineligible for adjustment, he would be eligible for a preference classification based on relationship and his application for an immigrant visa as a preference alien could be considered by an American consul abroad on the basis of a priority date obtained through approval of a visa petition.

7. An unmarried son or unmarried daughter of a commuter alien residing in Mexico or Canada is not eligible for extended voluntary departure under the changed policy.

8. An immediate relative (as defined in section 201(b)) illegally in the U. S. is not barred by employment from adjustment under the contemplated amendment of section 245. The other specified relatives should be given permission to engage in employment if granted extended voluntary departure (CO memorandum of April 27, 1973, CO 242.1-P and OI 242.10(b)(1)) and thus would

58a

All divisions ... Note particularly Par. 3 and requirement for residence on 4-10-73. ... 5-24-73

not be precluded from eligibility for adjustment. As explained in item 7 above the labor certification provision would not be applicable to immediate relatives or preference relatives.

9. Upon enactment of H.R. 981 and 982 into law policy set forth in letter of April 3, 1973, and implementing instructions shall be considered superseded and cancelled.

X Burlington, Vermont

CC: Regional Commissioner: Richmond, Virginia
Twin Cities, Minnesota

NERO NE 50/2-P May 23, 1973

TO: District Directors, Chief Patrol Agents, Officers-in-Charge, Northeast Region

The three page enclosure forwarded herewith is for your information and compliance.

Enclosure

E. J. Windblood, Jr., Associate Deputy Regional Commissioner, Operations, NERC

DISTRIBUTION:

District Directors	Chief Patrol Agents	Officers-in-Charge
Boston	Buffalo	
Buffalo		Albany
Hartford	Houlton	
Newark		Providence
New York	Ogdensburg	
Portland		
St. Albans	Swanton	

59c

242.8 Transcription of testimony and decision. Deportation-hearing testimony need not be transcribed if the decision of the special inquiry officer is final and permission to review or borrow a copy of it has not been requested.

When the special inquiry officer renders an oral decision, it shall not be transcribed unless it is appealed or certified, the respondent or the Service requests a copy, suspension of deportation is granted, or the special inquiry officer deems transcription necessary. An oral decision shall be transcribed when the special inquiry officer grants an application which was denied by the district director so that a copy may be filed in the public reading room in accordance with OI 103.8. If the oral decision is not transcribed, the special inquiry officer shall prepare and sign a memorandum for the file reflecting the date of hearing, that the decision was oral, that appeal was waived and a copy of the decision not requested, that the charge in the order to show cause and lodged charges were or were not sustained, the applications filed, the country to which the alien prefers to go if deported, and a succinct yet comprehensive denotation of the order, including the disposition of any applications.

242.10 Voluntary departure prior to commencement of hearing. (a) Authorization. Voluntary departure may be granted to any alien who is statutorily eligible therefor (1) who is a native of foreign contiguous territory and is not within the purview of class (6)(ii) of this paragraph; or (2) whose application for extension of stay as a nonimmigrant is being denied; or (3) who has voluntarily surrendered himself to the Service; or (4) who presents a valid travel document and confirmed reservation for transportation out of the United States within 30 days; or (5) who is an F-1, F-2,

EXHIBIT "L"

J-1, or J-2 nonimmigrant and who has lost such status solely because of a private bill introduced in his behalf; or (6) who is admissible to the United States as an immigrant and (i) who is not a native or citizen of foreign contiguous territory, is an immediate relative of a United States citizen or is otherwise exempt from the numerical limitations on immigrant visa issuance, or has a priority date for an immigrant visa not more than 60 days later than the date shown in the latest Visa Office Bulletin, and has applied for an immigrant visa at an American consulate which has accepted jurisdiction over the case; or (ii) who is a native of an independent country of the Western Hemisphere or the Canal Zone, has been in the United States since a date prior to April 11, 1973, and who on April 10, 1973 was and continues to be an immediate relative of a United States citizen, or the unmarried son or unmarried daughter of a United States citizen, or the spouse or unmarried son or unmarried daughter of a lawful permanent resident alien; or (7) any alien who has been granted asylum and who has not been granted parole status or a stay of deportation; or (8) in whose case the district director has determined there are compelling factors warranting grant of voluntary departure (Revised)

In cases within the jurisdiction of investigations, the authority of the district officer in charge of investigations or the officer in charge under 8 CFR 242.5 to grant or revoke voluntary departure prior to the commencement of hearing shall not be redelegated. The authority of chief patrol agents shall not be redelegated.

The respondent's nonimmigrant visa shall be cancelled, or his border crossing card voided, upon his acceptance of a grant of voluntary departure prior to the institution of deportation proceedings

61a

May 10, 1972

CO 703.876

Dear Mr. Smith:

This is with reference to your communication of March 25, 1972, with attached letter from Mr. Edward L. Kushner concerning the case of Mr. Ricardo Gomez.

Mr. Gomez is a 29-year-old native of Paraguay. He currently resides at 27 Radcliffe Road, Buffalo, New York. He was admitted to the United States as a visitor on July 24, 1971, for a period of six months. On August 14, 1971, he married Lidia Casco, a native of Paraguay. His wife was admitted to the United States on January 14, 1971, for permanent residence. She came to the United States to assume employment as a live-in domestic with Mr. Abraham Greenbaum of 27 Radcliffe Road, Buffalo, New York. Mr. Greenbaum has reported his position to be that of plant manager for P. Shuman & Sons of Depew, New York. On September 13, 1971, Mr. Gomez began unauthorized employment with the same firm as a plastic extruder operator helper at $2.25 per hour.

Mr. Gomez has applied for an immigrant visa at the United States Consulate in Toronto, Canada. His priority date is August 31, 1971. The latest visa office bulletin reporting the availability of immigrant visa numbers shows that visa numbers allocated for issuance in May of 1972 under the Western Hemisphere limitation were for applicants with priority dates earlier than December 1, 1970. Consequently, Mr. Gomez still faces a lengthy wait before a visa number becomes available to him.

The position in which Mr. Gomez finds himself is one which has developed since July 1, 1968, the effective date of the numerical limitation placed by Congress on immigration from the Western Hemisphere. Before July 1, 1968, visas were immediately available to natives of the Western Hemisphere who had labor certifications or were exempted, as Mr. Gomez is, and the Service normally permitted

EXHIBIT "M"

67a

aliens already in the United States to remain while awaiting the processing of their visa applications. However, after July 1, 1968, the numerical limitation became oversubscribed, resulting in a waiting list which has gradually grown longer. It became apparent that the Service policy of permitting aliens to remain in the United States awaiting visa issuance encouraged aliens to come to the United States, ostensibly to visit, but with the concealed intent to establish a priority date usually through unauthorized employment, and then on the basis thereof, request authorization to continue in their employment while awaiting visa issuance. Recognizing this developing situation and in consideration of other developments, including the concern for the mounting illegal alien problem, the Service changed its general policy. Now the Service permits only those aliens to stay in the United States awaiting visa issuance in whose case issuance can be expected within 60 days. This policy encompasses certain close relatives of citizens of the United States, since in their cases, Congress provided for an exemption from the numerical limitation. Congress did not, however, extend this exemption to relatives of permanent resident aliens. Congress has also seen fit to preclude natives of the Western Hemisphere, with the exception of certain refugees, from acquiring permanent resident status while in the United States.

While our general policy does not permit Mr. Gomez to remain in the United States to await a visa number, if there are some unusual circumstances which would make his departure unusually harsh at this time, he may request a temporary stay. The application for such stay should be made to the District Director of our Buffalo, New York office and should set forth all of the facts and substantiating evidence tending to show the unusual hardship. The District Director will give the application his full consideration.

Sincerely,

Raymond F. Farrell
Commissioner

Honorable Henry P. Smith, III
House of Representatives
Washington, D.C. 20515

stamped - Signed and Forwarded
May 10, 1972

Enclosure

cc: D.D. BUFFALO, NEW YORK. Re; Ricardo GOMEZ - A19 360 496
For your information and file

(Leary) CJL:WPO:smd

cc: Regional Commissioner, Burlington, Vt.-NERO-

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

63a. Mr. Wallenstein

Memorandum

NE 242.9-P
NE 243-P

TO : Solomon Marks, District Director,
New York

DATE: June 9, 1972

FROM : Socrates P. Zolotas, Regional Commissioner,
Burlington

SUBJECT: Relatives of Western Hemisphere Resident Aliens

There is attached a copy of a letter from the Commissioner to Congressman Smith dated May 10, 1972 which sets forth the Service policy concerning allowing relatives of permanent resident Western Hemisphere aliens to remain in the United States while they process applications for visas abroad. It is understood that your policy is at variance with the Service policy, in that you allow spouses of such resident aliens to remain in the United States while their visa applications are being processed, without regard to whether the "compelling factors" mentioned in O.I. 242.10(a)(8) are present.

You should immediately conform to the stated Service policy for all cases in which you are not already committed to allow the aliens to remain.

Please acknowledge receipt of this memorandum.

Attachment

Socrates P. Zolotas

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

EXHIBIT "N"

64a

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20515

June 27, 1972

Honorable Raymond F. Farrell, Commissioner
Immigration and Naturalization Service
Department of Justice
119 D Street, N. E.
Washington, D. C. 20536

Dear Mr. Commissioner:

Hearings conducted by this Subcommittee over the past year in the field of immigration law enforcement have pointed up the unfavorable influence which employment by illegal aliens is having on the domestic job market. This is, of course, particularly evident in those areas of the United States having a high rate of unemployment among Americans.

With this in mind, the Subcommittee believes that the Service practice of routinely permitting alien professionals and certain natives of the Western Hemisphere to remain in the United States until their visa priority dates are reached is no longer justifiable. These non-resident aliens and their dependents are competing for jobs with unemployed residents of the United States, and their numbers should not be allowed to increase further. The Subcommittee therefore recommends that this practice be terminated immediately, but that those aliens who have already been granted permission to remain pending visa availability be allowed to stay if they maintain the qualifications on which the privilege was given originally.

The Subcommittee is of the opinion that existing provisions of the Immigration and Nationality Act, particularly section 101(a)(15)(H)(i), are sufficient to provide for the admission of professionals to the United States to fill those positions which cannot be filled by United States residents.

Kindest regards.

Sincerely,

PETER W. RODINO, JR.
Chairman

PWR:ch

EXHIBIT "D"

Leon C. Wagel Jr.

UNITED STATES GOVERNMENT

Memorandum

CO 242.1-P

TO : All Regional Commissioners
All District Directors
All Files Control Offices

DATE: July 17, 1972

FROM : Associate Commissioner
Operations

SUBJECT: Voluntary Departure for members of the professions and persons having exceptional ability in the sciences or arts "(PSA)"; and for certain Western Hemisphere natives.

It has become apparent that unlawful employment of nonresident aliens in the United States has been having an increasingly unfavorable effect on the domestic job market. Hearings conducted by Subcommittee No. 1 of the House of Representatives Committee on the Judiciary over the past year have tended to emphasize that fact, and the Subcommittee has now recommended to the Service that the practice be terminated of routinely permitting alien professionals and certain Western Hemisphere natives to remain in the United States pending the availability of immigrant visas.

The Service has accepted the Subcommittee's recommendations. Accordingly, OI 242.10(a)(6) is terminated effective July 31, 1972, except for the following:

1. An alien already in voluntary departure status under that Operations Instruction.

2. A "PSA" alien in the United States on July 31, 1972, for whom an approved third or sixth preference petition was filed on or before that date.

3. A "PSA" native of an independent Western Hemisphere country or of the Canal Zone who is in the United States on July 31, 1972, and who had applied for an immigrant visa on or before that date.

Authorization for voluntary departure for such excepted aliens shall continue only for so long as the related petitions and visa applications remain valid and the aliens retain "PSA" eligibility. Similarly, such excepted aliens shall continue eligible for advance parole as presently provided. Nothing in this memorandum is intended to affect the grant

7-27-72

Read to officers at meeting 09:00 AM

N A Grace

EXHIBIT 40

66a

of voluntary departure to any alien eligible for that privilege on other grounds, nor to preclude temporary admission of and extension of stay of "PSA" aliens in accordance with section 101(a)(15)(H)(i) of the Act.

On and after July 31, 1972, a native of the Western Hemisphere who is the spouse, parent, or child of an alien lawfully admitted for permanent residence will not routinely be granted extended departure time to await visa issuance. The foregoing relationships, in and of themselves, are not to be considered a basis for granting extended departure time. Only those aliens within the purview of OI 242.10(a)(7) will be permitted extended departure time to await visa issuance. Those cases granted this privilege prior to July 31, 1972, will be continued in their present status without regard to the new criteria. However, the foregoing does not preclude a stay of departure in these cases under OI 242.10(a)(8) when compelling factors warranting favorable consideration are present. Stays under this category are to be granted for so long as the compelling factors are present, regardless of when visa issuance could be expected. A careful review is to be made of each case presented to determine whether or not compelling factors are present.

The Association of Immigration and Nationality Lawyers, the American Council of Voluntary Agencies for Foreign Service, Inc., and the National Association for Foreign Student Affairs have been furnished a copy of this memorandum. District Directors should notify all interested local organization in accordance with the sample attached.

Attachment

67a

News

AMERICAN IMMIGRATION AND CITIZENSHIP CONFERENCE

509 MADISON AVENUE · NEW YORK, N. Y. 10022

April 2, 1973

Special Bulletin No. 9

CONGRESSMAN RODINO ASKS FOR DELAY OF ENFORCED DEPARTURE OF CERTAIN WESTERN HEMISPHERE ALIENS

As reported in AICC NEWS, Vol, XVIII, No. 4, the Immigration and Naturalization Service at the suggestion of the House Judiciary Subcommittee on Immigration and Nationality ceased its policy of granting automatic deferred departure status for aliens in the professional classes, and natives of the Western Hemisphere with close lawful resident alien relatives in the United States. Noting that Subcommittee No. 1 is in the process of considering new legislation regarding the Western Hemisphere immigration situation, Rep. Rodino, Chairman of the House Judiciary Committee, suggested to Commissioner of Immigration and Naturalization, Raymond F. Farrell in a letter of March 28, 1973 as follows:

Dear Mr. Commissioner:

I am sure you are aware that the Members of Subcommittee No. 1 of this Committee are commencing extensive hearings on legislation designed to establish a preference system for the Western Hemisphere.

My bill, H.R. 981, to amend the Immigration and Nationality Act in that respect is under active consideration by the Subcommittee. Knowing of their diligence and their awareness of the need for such legislation, it is my firm belief that legislation equalizing the two hemispheres will be favorably acted upon by the Committee during the current session of the Congress.

With that in mind, coupled with the fact that legislation permitting the adjustment of status of certain natives of the Western Hemisphere has already been ordered favorably reported to the House of Representatives, I believe that you should consider issuing instructions to your Field Offices to delay enforcing departure of natives of the Western Hemisphere who are immediate relatives as defined in section 201(b) of the Immigration and Nationality Act; the unmarried sons or daughters of United States citizens; and the spouse or unmarried son or daughter of an alien who has been lawfully admitted to the United States for permanent residence.

I feel certain that you will agree that this course of action will alleviate much hardship and that the interest of humanity will be better served. The uniting of families has been paramount in all consideration of legislation in the field of immigration.

Kindest regards.

Sincerely,

(signed) PETER W. RODINO, JR.
Chairman

EXHIBIT "Q"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT, and YANICK PETIT, on Behalf of Themselves, and all Aliens in the United States similarly situated,

Plaintiffs,

-against-

JAMES F. GREEN, as Commissioner of the Immigration & Naturalization Service, and SOL MARKS, as New York District Director of the United States Immigration & Naturalization Service,

Defendants.

OPINION

73 Civ. 3682

#40347

A P P E A R A N C E S :

FRIED FRAGOMEN & DEL REY, P.C.
Attorneys for Plaintiffs
515 Madison AVenue
New York, N.Y. 10022

AUSTIN T. FRAGOMEN, JR., ESQ.
MARTIN L. ROTHSTEIN, ESQ.
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New York, N.Y. 10007

STANLEY H. WALLENSTEIN, ESQ.
Special Assistant United States Attorney
JOSEPH P. MARRO, ESQ.
Assistant United States Attorney
Of Counsel

GAGLIARDI, D. J.

This is an action by Rodolphe Noel, Emiris Noel, Eddy Antoine Petit and Yanick Petit on behalf of themselves and other aliens similarly situated challenging the policy of the Immigration and Naturalization Service (hereinafter the Service) which denies to Western Hemisphere aliens married to permanent resident aliens and illegally in this country awaiting issuance of a visa the discretionary relief of an extended departure date, except upon a showing of compelling factors. By motion for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure plaintiffs seek an order restraining the deportation of Rodolphe Noel and Eddy Antoine Petit and restraining the implementation of the policy pending the determination of this declaratory judgment action. The motion for preliminary relief is denied upon examination of the affidavits submitted by the parties. Dopp v. Franklin National Bank, 461 F.2d 873, 879 (2d Cir. 1972).

Rodolphe Noel, a native and citizen of Haiti, was admitted to this country as a non-immigrant visitor in May, 1969 on a two month temporary basis. Having remained longer than permitted, Noel was eventually apprehended by the Service on June 15, 1972, and deportation proceedings against him were commenced the following day. During the course of the proceedings, Noel applied for and was granted the discretionary relief

of voluntary departure pursuant to which he was to depart by September 27, 1972, or, failing to do so, a deportation order to Haiti would become effective. A warrant of deportation was issued, effective August 21, 1973, when Noel failed to comply with the order. On August 20, 1973 Noel requested the District Director to extend the date for his voluntary departure on the basis of his marriage on April 19, 1973 to plaintiff, Mrs. Emiris Noel, a permanent resident alien of the United States until such time as a visa became available. The application was denied.

Plaintiff, Eddy Antoine Petit, a native and citizen of Haiti, is also presently subject to a warrant of deportation. Similarly admitted for two months as a non-immigrant visitor in August, 1970, Petit remained longer than permitted, and he was apprehended by the Service on June 7, 1973. At his deportation hearing, Petit also applied for and was granted the discretionary relief of voluntary departure. He was given thirty days in which to leave, or in the alternative, an order of deportation to Haiti would issue. Prior to the expiration of the thirty day period, Petit married plaintiff, Mrs. Yanick Petit on June 26, 1973. Proceeding on the same basis as plaintiff Noel, Petit made an application for suspension of voluntary departure until a visa became available. Petit's request was denied, and departure was set for July 27, 1973. Following his failure to depart, the Service issued a warrant of deportation effective September 5, 1973. Deportation of both

Noel and Petit has been voluntarily stayed by the Service pending decision on this motion.

Section 244(e) of the Immigration and Nationality Act, 8 U.S.C. §1254(e), provides that in the course of a deportation proceeding an alien may apply for the privilege of voluntary departure. The Regulations permit the Special Inquiry Officer in his discretion to specify the time within which the alien must depart. 8 C.F.R. §244.1 (1973). "Authority to extend the time within which to depart voluntarily specified initially by a special inquiry officer or the Board is within the sole jurisdiction of the district director." 8 C.F.R. §244.2 (1973).

To mitigate the hardship an order of deportation has on a Western Hemisphere alien married to a permanent resident alien and illegally in this country, the District Director in New York followed a policy from 1968 through part of 1972 of granting an extension of voluntary departure to those deportable aliens pending issuance of a permanent visa.[1] However, hearings conducted by the Subcommittee on Immigration and Nationality of the House of Representatives Committee on the Judiciary in early 1972 revealed the adverse effect such a policy was having on the domestic labor market. Moreover, by 1972 the large number of persons from the Western Hemisphere seeking the limited number of available visas resulted in a substantial waiting list.[2] Based on this information

and a recommendation of the Subcommittee's Chairman, Congressman Peter W. Rodino, Jr., the Service established guidelines with respect to extended voluntary departures effective August 1, 1972. Under the altered policy, an alien's status of marriage to a permanent resident alien is insufficient in itself to warrant deferred departure; stays are to be granted only in individual cases upon a showing of compelling factors. See Memorandum, Associate Commissioner, Operations to All District Directors, et al., July 17, 1972, p. 2.

In response to pending legislation introduced in Congress which will significantly change the status of Western Hemisphere aliens with respect to preference quotas[3] and adjustment of status,[4] and upon the recommendation of Congressman Rodino, the Service announced on April 11, 1973 that Western Hemisphere alien spouses of permanent resident aliens could, as a matter of discretion, be granted an extended voluntary departure. Less than two weeks later, the Service confined the modification to those aliens who were in the country and married to a permanent resident alien as of April 10, 1973. Telegram dated April 20, 1973 from Acting Commissioner Greene. All other Western Hemisphere aliens who entered the country and married a permanent resident alien after that date are treated under the policy effective August 1, 1972. The Service maintained that this modification was adopted to delay "enforcement of departure of specified relatives who are

already in the United States," but "not adopted as an invitation to aliens to thereafter enter this country." See Memorandum, Associate Commissioner, Operations to Regional Commissioner, San Pedro, California, May 16, 1973, p. 2.

Under Section 201(b) of the Immigration and Nationality Act, 8 U.S.C. §1151(b), aliens who are the children, spouses or parents of United States citizens are classified as "immediate relatives" and may be granted immigrant visas without regard to numerical limitations or the hemisphere of origin. Once so classified, such relatives may obtain a permanent visa within a matter of months. Consequently, an alien spouse of a United States citizen is generally accorded an extension of voluntary departure pending issuance of a permanent visa.

Plaintiffs contend that the August 1, 1972 policy and its April 10, 1973 modification constitute: (1) an arbitrary, capricious and gross abuse of administrative discretion; (2) a violation of the constitutional guarantee of equal protection of laws; (3) a violation of the publication requirement of the Administrative Procedure Act, 5 U.S.C. §553; and (4) a violation of the constitutional principle of separation of powers, see Kilbourn v. Thompson, 103 U.S. 168, 190 (1881).

"[T]he two-fold requirement for a preliminary injunction is a demonstration of probability of success on the merits and a showing that irreparable harm will result if such relief is denied." Gulf & Western Industries, Inc. v. The Great Atlan-

tic & Pacific Tea Company, Inc., 476 F.2d 687, 692 (2d Cir. 1973).

First, plaintiffs maintain that the differences in treatment between alien spouses of United States citizens and alien spouses of permanent resident aliens, and within the latter category, between aliens present in the country and married as of April 10, 1973 and those who arrive or marry after that date constitute a gross abuse of discretion and are unlawful. The Second Circuit has held that in the grant or refusal of voluntary departure, the Service and the administrator may establish groups of persons entitled to discretionary relief so long as the classifications are rationally related to the statutory scheme. Buckley v. Gibney, 332 F. Supp. 790 (S.D.N.Y.), aff'd per curiam, 449 F.2d 1305 (2d Cir. 1971), cert. denied, 405 U.S. 919 (1972); Fook Hong Mak v. Immigration and Naturalization Service, 435 F.2d 728 (2d Cir. 1970); Lam Tat Sin v. Esperdy, 334 F.2d 999 (2d Cir. 1964).

The treatment of married Western Hemisphere aliens for purposes of extended voluntary departure on the basis of classification of spouse is reasonable in view of the statutory scheme which places no immigrant visa quota on spouses of citizens, but imposes a numerical limitation on spouses of permanent resident aliens. In practical terms, the apparent difference in time required to obtain a permanent visa substantiates the differentiation. Furthermore, it is certainly within the Service's discretion to conclude that other considerations may

at some time warrant lenient treatment, but that to grant it in all situations would encourage aliens to enter illegally, and acquire the status, and would open a loophole in disregard of the statute. 1a

Plaintiffs second argument is that the two classifications in issue deny plaintiffs the constitutional guarantee of equal protection of the laws. In Dorass v. The Village of Belle Terre, 476 F.2d 806 (2d Cir.) rehearing en banc denied, prob. juris. noted, 42 U.S.L.W. 3226 (U.S. October 15, 1973) (No. 191), the Second Circuit held that: "If the classification, upon review of facts bearing upon the foregoing relevant factors, is shown to have a substantial relationship to a lawful objective and is not void for other reasons, such as overbreadth, it will be upheld." 476 F.2d at 814. Distinctions drawn for the purpose of granting stays of deportation have consistently passed constitutional muster in this Circuit. Buckley v. Gibney, supra, 332 F. Supp. at 795; Application of Anoury, 307 F. Supp. 213 (S.D.N.Y. 1969) (Weinfeld, J.); see Faustino v. Immigration and Naturalization Service, 432 F.2d 429 (2d Cir.), cert. denied, 401 U.S. 921 (1971); Mitai v. Immigration and Naturalization Service, 343 F.2d 466 (2d Cir.), cert. denied, 382 U.S. 816 (1965); accord, Perdido v. Immigration and Naturalization Service, 420 F.2d 1179 (5th Cir. 1969). 1/ The classifications in this case are no less substantially related to the statutory scheme which treats relatives of citizens

differently from relatives of permanent resident aliens than those classifications based on other statutory distinctions which distinguish between the nature of the work one performs, see Buckley v. Gibney, supra, or the citizenship of one's parents, see Application of Amoury, supra.

Third, plaintiffs contend that the August 1, 1972 policy and April 10, 1973 modification are invalid since the Service failed to publish the "rules" on thirty days' notice in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §553 (b), (d). Under the test set forth in Lewis-Mota v. Secretary of Labor, 469 F.2d 475 (2d Cir. 1972), whether given instructions are to be considered a "rule" under 5 U.S.C. §551(4) or within the exception for a "general statement of policy" under 5 U.S.C. §553(b), the Court must look to the "substantial impact of the action" on the "existing rights and obligations of the parties." 469 F.2d at 482. In Lewis-Mota, aliens admitted to this country with labor certifications based on a precertified list of jobs in short supply found themselves no longer certified (after their temporary visas expired) following the Secretary of Labor's suspension of the precertified lists without notice. The court invalidated the rule based on the Service's failure to publish it on thirty days' notice. Neither at the time the instructions were altered on August 1, 1972, nor at the time the Service determined to grant the benefit to those aliens who were already in the country

and married to a permanent resident alien on April 10, 1973, were plaintiffs Noel and Petit married to permanent resident aliens. In fact, each may still be entitled under the Regulations to a deferred voluntary departure on the basis of hardship, in the discretion of the district director, as is any deportable alien whether married or not. 8 C.F.R. §§ 244.1 and 244.2 (1973).

Plaintiffs' final argument that the Service abdicated its statutory responsibility to the Chairman of the Subcommittee on Immigration and Nationality in violation of the constitutional principle of separation of powers falls wide of the mark. While it is conceded that the Chairman made certain recommendations to the Service based on information gathered during congressional hearings, correspondence from the Service indicated that to the extent followed, the changes in the instructions were based on the information provided, and not upon an order from the House Subcommittee.[5]

Upon review of plaintiffs' arguments, the probability of ultimate success on the merits is not sufficiently likely to warrant the preliminary relief requested. Accordingly, the motion for a preliminary injunction is denied.

So Ordered.

U.S.D.J.

Dated: New York, New York
February 6, 1974.

FOOTNOTES

1. The affidavits of the parties are unclear as to what periods of time a formal policy to grant deferred departure was effective prior to 1972. It is certain, however, that New York's District Director routinely granted lenient treatment. (Government's Exhibit N, Letter Regional Commissioner, Burlington, Vermont to District Director, New York, June 9, 1972). For purposes of this motion it is unnecessary to determine whether a policy of leniency was consistently followed by district directors prior to July 31, 1972, or whether inconsistent policies were followed by district directors in the exercise of their discretion.

2. Under the amendments to the Immigration and Nationality Act in 1965, Western Hemisphere aliens are treated separately for purposes of permanent visas from the rest of the world, and a numerical limitation is established to be filled on a first come, first served basis. Section 101 (a)(27) and 201(a) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(27) and 1151(a). For aliens from the Western Hemisphere as well as other aliens, who wish to immigrate for the purpose of entering the domestic labor market, the statute requires a labor certification from the Secretary of Labor to the effect that entry will not adversely affect the domestic labor market. Western Hemisphere aliens who are parents, spouses or children of United States citizens or of permanent resident aliens are excepted from this requirement. Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14). Whether certified or excepted from certification, issuance of visas to Western Hemisphere aliens is subject to the numerical limitations in the statute.

3. Under proposed H.R. 981, the two separate quotas for Western Hemisphere aliens and "Worldwide" aliens would be replaced by one overall numerical ceiling. The visa preference now presently applicable to only Worldwide aliens, which accords alien spouses of permanent resident aliens preference, will apply to Western Hemisphere aliens as well. Under the proposal, immediate relatives of permanent resident aliens will be given first preference status.

4. Under proposed H.R. 982, Section 245 of the Immigration and Nationality Act, 8 U.S.C. §1255 which presently permits certain aliens under prescribed conditions to adjust to a permanent status while in this country will apply to Western Hemisphere aliens. The exclusion of Western Hemisphere aliens from this benefit under the present law has given rise to the problems underlying the issues in this case.

79a

5. Memorandum, Associate Commissioner, Operations to All District Directors, et al., July 17, 1972, p. 1.

80a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT, and YANICK PETIT, On Behalf of Themselves, and All Aliens in the United States Similarly Situated,

Plaintiffs,

v.

JAMES F. GREEN, As Commissioner of the Immigration & Naturalization Service, and SOL MARKS, as New York District Director of the United States Immigration & Naturalization Service,

Defendants.

----------x

AMENDED
NOTICE OF APPEAL

File No. 73C3682 LPG

Plaintiffs RODOLPHE NOEL, EMIRIS NOEL, EDDY ANTOINE PETIT, and YANICK PETIT, hereby appeal to the U.S. Court of Appeals for the Second Circuit from the Order of Hon. Lee Gagliardi, United States District Judge, entered in this Action on the 8th day of February, 1974.

POLLACK & KRAMER
ATTORNEYS FOR PLAINTIFFS
26 Court Street - Room 2105
Brooklyn, New York 11242
Tel. No.: (212) 852-0110

TO: Clerk of the
United States District Court
Southern District of New York

United States Attorney
Southern District of New York
U. S. Courthouse
Foley Square, New York 10007

FRIED FRAGOMEN & DEL REY, P.C.
OF COUNSEL
515 Madison Avenue
New York, New York 10022
Tel. No.: (212) 688-8555

By: Martin L. Rothstein
Martin L. Rothstein

Sworn to before me, this day of 19

CERTIFICATE OF SERVICE

State of New York)
) SS:
County of New York)

Judith Felsen, being duly sworn, deposes and says that on this date I served one copy of the attached APPELLANTS' APPENDIX upon the APPELLEES-DEFENDANTS by mailing one copy thereof, postage prepaid, to the following counsel of record:

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Defendants

Stanley H. Wallenstein
Special Assistant
United States Attorney

Joseph P. Marro
Assistant
United States Attorney

DATED: June 7, 1974

Judith Felsen

Judith Felsen

Subscribed and sworn to

before me, this 7th day

of June, 1974

Leon Friedman

LEON FRIEDMAN
Notary Public, State of New York
No. 31-0114025
Qualified in New York County
Commission Expires March 30, 1976